Supreme Court, U.S.
FILED
SEP 17 2003

No. 03 436

In The

Supreme Court of the United States

FABIEN ELDRIDGE,

Petitioner,

vs.

WILLIAM GIBSON, DAVID DAY, MICHAEL KNOWLTON, ROBERT DURHAM, and SAM LEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 17, 2003

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I. QUESTIONS PRESENTED

Are privately retained and privately compensated attorneys with a direct and substantial financial interest in obtaining a criminal conviction to advance their contingency fee recovery in a contemporaneous civil suit for $3 million arising out of the same facts as the criminal prosecution entitled to assert the defenses of absolute or qualified immunity as defendants in a damages action brought under 42 U.S.C. section 1983 by a criminal defendant for their prosecutorial participation in his criminal prosecution at the behest of their private clients pursuant to a state statute which permitted private attorneys retained by the victim to participate at the criminal trial but where they exercised substantial control over the proceedings and where a state court invalidated the criminal defendant's conviction due to their prosecutorial participation as violative of his Constitutional due process rights under the Tennessee and United States Constitutions?

Is a district attorney's appointment of and delegation of authority to privately retained and privately compensated attorneys with a direct and substantial financial interest in obtaining a criminal conviction to criminally prosecute a criminal defendant pursuant to a state statute which permitted private attorneys retained by the victim to participate at the criminal trial at the district attorney's discretion but where the district attorney "decline[d] any further involvement [of his office] due to [their] busy schedules" other than the rebuttal closing argument at trial entitled to assert the defense of absolute immunity as a defendant in a damages action brought under 42 U.S.C.

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section 1983 by the criminal defendant where the appointment and delegation of authority were administrative acts unrelated to the initiation of the charges or any act of advocacy which would have subjected him to suit for malicious prosecution at common law?

Is a district attorney entitled to assert the defense of qualified immunity for his appointment of and delegation of authority to privately retained and privately compensated attorneys with a direct and substantial financial interest in obtaining a criminal conviction to criminally prosecute a criminal defendant where he has actual knowledge of the private attorneys' conflict of interest and case law prohibiting such conduct as violative of the criminal defendant's Constitutional due process rights under the Fourteenth Amendment, and where the Constitutional prohibition of criminal prosecutions by prosecutors with a direct and substantial financial interest in obtaining a criminal conviction was clearly foreshadowed by this Court's earlier decisions?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Fabien Eldridge respectfully prays that a writ of *certiorari* issue to review the final judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 19, 2003.

II. OPINIONS BELOW

The plurality opinion of the United States Court of Appeals for the Sixth Circuit is reported. *Eldridge v. Gibson*, 332 F.3d 1019 (6th Cir. 2003). (App. 1-12). The decision of the United States District Court for the Middle District of Tennessee is not reported. (App. 13-54). Both decisions are reproduced in the Appendix hereto.

III. JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 19, 2003. This petition for writ of *certiorari* was filed in this Court within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

IV. STATUTORY PROVISIONS INVOLVED

42 U.S.C. section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress.

For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a state of the District of Columbia.

T.C.A. section 8-7-401 (1993):[1]

A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or the district attorney general's deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general. The district attorney general or a deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the district attorney of such counsel's employment.

T.C.A. section 8-7-104:

District attorneys general are prohibited from engaging in the practice of law.

T.C.A. section 8-7-106:

(a) If the district attorney general fails to attend the circuit or criminal court, or is disqualified from acting, or if there is a vacancy in the office, the court shall appoint some other attorney to supply such district attorney general's place temporarily. The acts of such district attorney general pro tem shall be as valid as if done by the regular officer, and the district

[1] T.C.A. section 8-7-401 was amended in 1996; however, the amendment was not in effect during the events at issue.

> attorney general pro tem shall be entitled to the same privileges, and emoluments.

T.C.A. section 8-7-106 is reproduced in its entirety in the Appendix attached hereto at App. 85-86.

V. STATEMENT OF THE CASE

Petitioner Fabien Eldridge was arrested and charged with attempted first degree murder following an altercation with Robert Allen Fahey on November 10, 1992. Mr. Fahey claimed that the petitioner attacked him with a lock-blade knife. No lock-blade knife was found by police. Petitioner claimed that Mr. Fahey attacked him with a kitchen knife. Four kitchen knives belonging to Mr. Fahey were taken into custody by police. One of the four kitchen knives had blood on it. None of the kitchen knives was tested for blood type or fingerprints. Prior to trial, one of the kitchen knives was lost. The circumstances surrounding the loss of this knife are unknown.

On October 22, 1993, approximately seven months prior to the petitioner's criminal trial, private attorneys David Day, Michael Knowlton and Robert Durham [hereafter "private attorney defendants"] filed a civil lawsuit against the petitioner, seeking $1,000,000 in compensatory damages and $2,000,000 in punitive damages on Mr. Fahey's behalf for alleged injuries arising from the November 10, 1992 incident prosecuted in the criminal case. The private attorney defendants were retained by Mr. Fahey on a contingency fee basis.

During the pendency of the civil suit, District Attorney General William Gibson agreed to permit the private attorney defendants to participate in the petitioner's criminal prosecution pursuant to T.C.A. section 8-7-401

(1993). The participation of the private attorney defendants in the criminal prosecution was unrelated to the initiation of the charges against the petitioner, and Gibson claims that his office would have continued to prosecute the petitioner on the criminal charges regardless of the appointment of the private attorney defendants. The exact date when the private attorney defendants began their participation in the petitioner's criminal prosecution is disputed.

On or about May 3, 1994, Gibson's office sent a letter to the private attorney defendants, confirming their participation in the petitioner's criminal prosecution, advising that various items of evidence would be delivered to them, stating that defense discovery would be completed through their office, and enclosing a copy of *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967), "setting forth some limitations for special prosecutors who are handling a civil case arising out of the same offense." Gibson's office "decline[d] any further involvement [in the petitioner's criminal prosecution] due to our busy schedules, other than the requirements of *Ganger* and T.C.A. s 8-7-401." *Ganger, supra,* 379 F.2d at 714, unequivocally condemns the participation in a criminal prosecution of prosecutors who are handling a civil case arising out of the same offense as violative of the criminal defendant's Constitutional due process rights under the Fourteenth Amendment of the United States Constitution.

The state trial court approved Gibson's *ex parte* order permitting the private attorney defendants to participate in the petitioner's criminal prosecution pursuant to T.C.A. section 8-7-401 because the court believed that it had no discretion to deny the request, stating pursuant to the language of T.C.A. section 8-7-401, "the law in this State is that it's not my call[,] [i]t's the District Attorney's call."

The private attorney defendants admit that they contemporaneously represented Mr. Fahey in the pending civil lawsuit arising out of the identical facts which gave rise to the criminal prosecution, they had a direct financial interest in the petitioner's conviction, and the petitioner's payment of money in the civil action would have resulted in a favorable recommendation by the private attorney defendants in his criminal prosecution.

On May 19, 1994, the petitioner was convicted of attempted second degree murder and subsequently sentenced as a standard offender to nine and one-half years in the Tennessee Department of Corrections and fined in the amount of $25,000.

On May 1, 1995, the petitioner filed the within action against the private attorney defendants, Gibson, among others, for monetary damages pursuant to 42 U.S.C. section 1983 for violations of his Constitutional rights arising out of his arrest and criminal prosecution in *State v. Eldridge,* 951 S.W.2d 775 (Tenn. Crim. App. 1997). The complaint was initially dismissed pursuant to *Heck v. Humphrey,* 512 U.S. 477 (1994). The complaint was then reinstated pursuant to a motion for reconsideration. The case was then stayed and administratively closed pending the disposition of the petitioner's criminal prosecution.

On May 7, 1997, the Tennessee Court of Criminal Appeals reversed the petitioner's conviction, finding that the prosecutorial participation of the private attorney defendants who also represented the alleged victim in a pending civil lawsuit arising from the same incident violated the petitioner's due process rights to a fair trial under the United States and Tennessee Constitutions.

On September 6, 2000, Judge Charles D. Haston, sitting by special assignment by the Tennessee Supreme Court, dismissed the state criminal case with prejudice for

a violation of the petitioner's right to a speedy trial based on, among other things, prejudice to the defense caused by the loss of material evidence.

On October 10, 2000, the petitioner moved the district court to reopen and resume the proceedings on his complaint for monetary damages under 42 U.S.C. section 1983 against the private attorney defendants and Gibson on the basis that his criminal prosecution had been dismissed. The district court granted the petitioner's motion on August 2, 2001.

On August 3, 2001, the district court dismissed the petitioner's complaint against the private attorney defendants and Gibson, stating that "despite facts to show a due process violation with the appointment of these private attorneys, under the governing law, the Defendants Gibson, Day, Knowlton and Durham are entitled to absolute immunity."

Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. section 1291. On June 19, 2003, the Sixth Circuit affirmed the district court's dismissal of the petitioner's complaint. With regard to the private attorney defendants' entitlement to immunity, Judge Gilman delivered the lead opinion of the Court, concluding that the private attorney defendants were entitled to absolute immunity. Judge Nelson delivered a separate opinion concurring in the judgment, finding it unnecessary to reach a firm conclusion on the absolute immunity issue because the private attorney defendants were entitled to qualified immunity. Judge Cole delivered a separate opinion concurring in part and dissenting in part, concluding that the case should be remanded to the district court to determine in the first instance whether the private attorney defendants were entitled to qualified immunity. With regard to Gibson's

entitlement to immunity, the Court unanimously affirmed the district court's decision without comment.

This timely petition for writ of *certiorari* follows.

VI. REASONS FOR GRANTING THE WRIT

A. The Sixth Circuit Court Of Appeals Has Decided By Plurality Opinion An Important Question Of Federal Law Concerning Whether Private Attorneys Employed And Compensated By Private Clients While Performing Prosecutorial Functions Against Criminal Defendants At The Behest Of Their Private Clients Are Entitled To Absolute Or Qualified Immunity In Actions Brought Under 42 U.S.C. Section 1983, And Because This Issue Has Never Been Addressed By This Court And Relevant Decisions Have Awarded Absolute Immunity To Public Prosecutors For Their Prosecutorial Functions But Denied Even Qualified Immunity For Private Parties Working For Profit Regardless Of Function, The Issue Raises An Important Question Of Federal Law That Should Be Settled By This Court.

The first issue presented by this petition raises an important core question of federal law regarding the availability of absolute and qualified immunity defenses to private attorneys privately employed and compensated by private clients acting under color of law while performing prosecutorial functions in criminal prosecutions at the behest of their private clients, an issue left unresolved by recent prior decisions of the Court. This issue is at the crossroad between *Imbler v. Pachtman,* 424 U.S. 409 (1976), which afforded absolute immunity to public prosecutors for prosecutorial acts and *Richardson v. McKnight*,

521 U.S. 399 (1997), which denied qualified immunity to private parties working for profit while performing traditionally governmental functions. This juxtaposition raises a fundamental question of federal law in actions brought under 42 U.S.C. section 1983, and as reflected by the sharply conflicting views espoused in the Sixth Circuit's plurality opinion, review by the Court is necessary to settle this issue.

Athough 42 U.S.C. section 1983 admits to no immunities on its face, in *Tenney v. Brandhove,* 341 U.S. 367 (1951), the Court held that legislators were entitled to absolute immunity for their official actions because they had been afforded such immunity historically and for reasons of public policy. *Id.* at 376. The decision in *Tenney* established that section 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them. Using these principles, the Court subsequently awarded absolute immunity for judges acting within their judicial jurisdiction, qualified immunity for police officers sued for unlawful arrest, qualified immunity for state executive officials performing discretionary duties of their office, and qualified immunity for school officials imposing disciplinary penalties, among others.

In *Imbler, supra,* 424 U.S. 409, the Court addressed whether a state prosecuting attorney acting within the scope of his duties in initiating and pursuing a criminal prosecution and presenting the State's case, was absolutely immune from suit in an action brought under section 1983. Using the same principles established in *Tenney,* the Court found that historically, public prosecutors were immune from suit for malicious prosecution and special policy reasons, including intimidation from the performance of his public duties and the undue burden of retrying all criminal prosecutions in the context of section

1983 actions, supported a public prosecutor's absolute immunity from suit for their prosecutorial functions. *Id.* at 417-31. *Compare Burns v. Reed,* 500 U.S. 478 (1991) and *Buckley v. Fitzsimmons,* 509 U.S. 259 (1993) (Affording only qualified immunity to public prosecutors performing administrative and investigative functions.)

In *Tower v. Glover*, 467 U.S. 914 (1984), the Court denied immunity to two public defenders employed by the State of Oregon who allegedly conspired with various state officials to secure a criminal defendant's conviction.[2] In denying immunity to these state employed attorneys, the Court stated:

> Section 1983 immunities are "predicated upon a considered inquiry into the immunity historically accorded the relevant ***official*** at common law and the interests behind it." If *an* ***official*** was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions. (Emphasis added.)

Id. at 920.

Using this framework, the Court noted that there were no public defenders at common law and equated public defenders to their "reasonably close" historical "cousin," the English barrister, who enjoys a broad immunity from liability for negligent misconduct, but not for intentional misconduct. *Id.* at 921. ***The Court expressly noted that historically, a privately retained lawyer***

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[2] Similar to Oregon, Tennessee has afforded no immunity to private attorneys employed under T.C.A. section 8-7-401.

would not have enjoyed immunity from tort liability for intentional misconduct, *citing Baker v. Humphrey,* 101 U.S. 494 (1880); *Von Wallhoffen v. Newcombe,* 10 Hun. 236 (N.Y. Sup. Ct. 1877); *Hoope v. Burnett,* 26 Miss. 428 (1853). *Tower, supra,* 467 U.S. at 921-22. In conclusion, the Court stated:

> We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to ***state or federal institutions*** and, if so, what remedial action is appropriate. We conclude that state public defenders are not immune from liability under § 1983 for intentional misconduct, "under color of" state law, by virtue of alleged conspiratorial action with state officials that deprives their clients of federal rights." (Emphasis added.)

Id. at 923.

Significant to each of these opinions is the fact that only a public official's entitlement to immunity was at issue, and their entitlement to immunity was based on whether their historical counter-part had been afforded immunity at common law and whether the special policy reasons underlying immunity supported their entitlement to immunity. The Court has applied the *Tenney* analysis to private parties, and based on the express absence of special policy reasons underlying a public official's entitlement to immunity, private parties have consistently been denied immunity in section 1983 actions.

Specifically, in *Wyatt v. Cole*, 504 U.S. 158 (1992), the Court was asked to determine "whether private defendants charged with 42 U.S.C. section 1983 violations are entitled to qualified immunity from suit." *Id.* at 159. The Court noted:

> The question on which we granted certiorari is a very narrow one. "Whether private persons, who conspire with state officials to violate constitutional rights, have available to them the good faith immunity applicable to public officials." The precise issue encompassed in this question, and the only issue decided by the lower courts, is whether qualified immunity, . . . is available for private defendants invoking a state replevin, garnishment or attachment statute.

Id. at 168.

The Court in *Wyatt* concluded that qualified immunity is not available to defendants acting purely as private parties for personal gain invoking unconstitutional statutory seizure remedies. *Id.* at 168-69. In reaching its conclusion, the Court noted "that the rationales mandating qualified immunity for public officials are not applicable to private parties." *Id.* at 167. In so holding, the Court noted.

> In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity. (Citations omitted.)

Id. at 168.

The *Wyatt* Court's conclusions were mirrored in *Richardson, supra*, 521 U.S. 399, where the Court denied qualified immunity to prison guards who were privately employed by a private prison management firm and performed duties traditionally performed by governmental employees in an action by prisoners charging a section 1983 violation.

Rejecting a purely functional approach previously applied to public officials to determine the TYPE of immunity applicable to the specific conduct at issue, the Court once again applied the *Tenney* analysis to focus on the

historical bases for immunity and the special policy considerations underlying immunity which support a PUBLIC OFFICIAL's entitlement to immunity. *Id.* at 404, 408. The Court noted that it had NEVER held that "the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity." *Id.* at 408-409. The Court further noted that a purely functional approach bristled with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities. *Id.* at 409.

With regard to the historical bases for immunity, although the Court found that government-employed prison guards may have enjoyed "a kind of immunity" defense arising out of their status as public employees at common law, (*id.* at 405), there was no historical basis for immunity for "private individuals working for profit." *Id.* at 407. The Court did note that historically, "the law did provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign," *citing Tower*. *Id.* However, in *Tower,* the Court expressly noted that historically, a privately retained lawyer working on behalf of a private client would not have enjoyed immunity from tort liability for intentional misconduct. 467 U.S. at 921-22.

The distinction between these two categories of attorneys is pertinent to this petition because although performing prosecutorial functions, the private attorney defendants were privately employed, privately compensated, acting on behalf of a private client, and having a direct financial interest in the petitioner's conviction. The private attorney defendants were not acting at the behest of the State of Tennessee, but rather, they were permitted to participate in the petitioner's criminal trial pursuant to

T.C.A. section 8-7-401 AT THE BEHEST AND ON BEHALF OF MR. FAHEY. This distinction places the private attorney defendants in the category of privately retained lawyers found to have no historical basis for immunity for intentional misconduct in *Tower,* rather than the category of lawyers historically afforded "a kind of immunity" for performing services at the behest of the sovereign.

This distinction is also pertinent to Justice Scalia's comment in his dissent in *Richardson,* where he stated, "I think it highly unlikely that we would deny prosecutorial immunity to those private attorneys increasingly employed by various jurisdictions in this country to conduct high-visibility criminal prosecutions." *Id.* at 418. Under the majority opinion in *Richardson,* a private attorney employed by or at the behest of a sovereign historically would have been afforded immunity, but not a privately employed attorney working on behalf of a private client for profit.

This is precisely the basis for the Sixth Circuit's denial of absolute and qualified immunity to a private attorney performing prosecutorial functions during a criminal prosecution in *Cooper v. Parrish*, 203 F.3d 937 (6th Cir. 2000). Specifically, the private attorney was improperly appointed as a "special prosecutor" under T.C.A. section 8-7-106 which did not authorize his appointment, and he was employed by a special interest group and paid with private funds. *Id.* at 950-51, 952-53. Although the private attorney performed prosecutorial functions for which the District Attorney was absolutely immune, the private attorney was denied any immunity. *Id.* Although the District Court distinguished *Cooper* because the private attorney in that case was not properly appointed pursuant to a state statute and he was paid with private funds, T.C.A. section 8-7-401 expressly states that the private attorney defendants performed their

prosecutorial functions as privately employed and privately compensated attorneys working for a private client with none of the privileges and emoluments of a public prosecutor expressly extended to special prosecutors appointed under T.C.A. section 8-7-106.

In addition to the absence of any historical basis for affording immunity to a private attorney employed and compensated by a private client for profit, there are also no special policy reasons which would support their entitlement to immunity.

First, private attorneys hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Their participation in the criminal proceedings is entirely voluntary and entirely financially motivated, and their absence would in no way harm the public since the public is represented by the public prosecutor, regardless of the participation of the private attorneys who act solely on behalf of their private client. Therefore, extending immunity to private attorneys working for profit would have no bearing on whether public officials are able to act forcefully and decisively in their jobs. In fact, the opposite is likely true. Public prosecutors are likely hindered from performing their duties forcefully and decisively, particularly when they would otherwise dismiss a weak prosecution, when private attorneys are permitted to participate in the prosecution precisely because of the improper motivations that are being introduced into the proceedings.

Further, private attorneys performing prosecutorial functions for profit are not burdened by unwarranted timidity because their own financial recovery is directly related to their attainment of a conviction. The private attorney defendants in this case stood to recover a contingency fee of up to $1 million through their attainment of a

criminal conviction which would have advanced their position in the related civil suit. This personal financial incentive, which does not exist for public prosecutors, is sufficient to overcome any timidity on the part of private attorneys. Moreover, because their participation in the criminal proceedings is voluntary, they can offset their potential exposure to liability through increased compensation from their clients. Private attorneys' exposure to potential professional malpractice in other cases has never caused increased timidity in the profession, and their exposure to potential liability for professional malpractice is substantially broader than their potential exposure to liability under 42 U.S.C. section 1983.

Second, extending immunity to private attorneys working for profit would have no bearing on whether qualified applicants enter public service because privately employed and privately compensated attorneys are not entering public service by participating in a criminal prosecution pursuant to T.C.A. section 8-7-401, but rather, they are merely representing a private client for their own financial gain. Public and special prosecutors are not privately compensated, they have no financial interest in obtaining a conviction, and they are protected by absolute immunity. Because district attorneys are prohibited from engaging in the practice of law, (T.C.A. section 8-7-104), they would never be exposed to the same liability as the private attorney defendants in this case. Therefore, talented candidates entering public service would not be deterred from entering public service by the denial of section 1983 immunity to privately employed, privately compensated attorneys working for a private client.

Third, unlike government officials performing discretionary functions, the public interest will not be unduly impaired if private attorneys representing private clients were required to proceed to trial to resolve their

legal disputes. *See Dennis v. Sparkes*, 449 U.S. 24, 31-32 (1980) ([W]e agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.) *See also Manis v. Corrections Corporations of America*, 859 F.Supp. 302 (M.D. Tenn. 1994). Private attorneys operate with different incentives than public prosecutors where they have a direct and substantial financial interest in obtaining a conviction since a prosecutor's duty to seek justice and his salary is not related to any criminal conviction. It is certainly more conceivable that a private attorney hoping to recover a $1 million contingency fee would commit constitutional infractions, such as the destruction of exculpatory evidence, to ensure his financial recovery.

Accordingly, this Court should grant *certiorari* to resolve the conflict reflected in the Sixth Circuit's plurality opinion, and to establish that private attorneys working for a private client for profit are not entitled to absolute or qualified immunity, regardless of function, in actions brought under 42 U.S.C. section 1983, because there is a no historical basis for affording immunity to private parties working for profit or attorneys who are not employed by or working at the behest of a sovereign, and there are no special policy reasons which entitle this category of defendants to either absolute or qualified immunity.

B. The Sixth Circuit Court Of Appeals' Decision That Public Prosecutors May Be Entitled To Absolute Immunity In Actions Brought Under 42 U.S.C. Section 1983 For Administrative Acts Unrelated To The Initiation Of A Criminal Prosecution Or Acts Of Advocacy Which Would Have Subjected Them To Suits For Malicious Prosecution At Common Law Conflicts With Relevant Decisions Of This Court Holding That Prosecutors Are Entitled To Only Qualified Immunity For Administrative Acts, And The Sixth Circuit's Departure From The Court's Established Functional Approach To Determine The Type Of Immunity Available To Public Prosecutors Raises An Important Question Of Federal Law Which Should Be Addressed By This Court.

The second issue presented by this petition is the direct conflict between the Sixth Circuit's opinion in *Ireland v. Tunis,* 113 F.3d 1435 (6th Cir. 1997), and its application in this case to afford public prosecutors absolute immunity for administrative acts, and this Court's decisions in *Imbler, supra,* 424 U.S. 409, *Burns, supra,* 500 U.S. 478, *Buckley, supra,* 509 U.S. 259, among others, which hold that a public prosecutor is entitled to only qualified immunity for administrative or investigative acts based on a functional approach developed from a public prosecutor's immunity from suits for malicious prosecution at common law and special policy considerations supporting the specific need for immunity. The determination of the type of immunity available to public prosecutors in actions brought under 42 U.S.C. section 1983 is a fundamental core question of federal law, and the Sixth Circuit's departure from the Court's established functional approach should be addressed by the Court.

In *Ireland, supra,* 113 F.3d 1435, the Sixth Circuit affirmed absolute prosecutorial immunity to two county prosecutors for deciding to seek and obtaining an arrest warrant because such acts were advocacy functions intimately associated with the judicial phase of the criminal process. While this is a correct holding, the Court, *citing Imbler, supra,* 424 U.S. at 431 and *Malley v. Briggs,* 475 U.S. 335, 343 (1986), went on to state:

> **Absolute prosecutorial immunity will likewise attach to administrative or investigative acts necessary for a prosecutor to initiate or maintain the criminal prosecution.**[3] (Emphasis added.)

Ireland, supra, 113 F.3d at 1447.

Using this *dicta,* the district court granted Gibson absolute prosecutorial immunity for his appointment of and delegation of authority to the private attorney defendants in the petitioner's criminal prosecution. Specifically, the court recognized that while most personnel decisions are administrative acts, Gibson's decision was entitled to absolute prosecutorial immunity because even though Gibson admitted he would have continued the prosecution regardless of the participation of the private attorney

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[3] In *Malley, supra,* 475 U.S. 335, the Court denied absolute immunity but granted qualified immunity to a police officer in a section 1983 suit for allegedly causing the plaintiffs to be unconstitutionally arrested by presenting a judge with a complaint and supporting affidavit which failed to establish probable cause. Except for noting that a prosecutor would be absolutely immune for seeking an indictment, (which would expose him to liability for malicious prosecution at common law,) the Court made absolutely no comment about the scope of his immunity for administrative or investigative acts, and certainly provided no basis for the Sixth Circuit Court's statement in *Ireland* or Gibson's entitlement to absolute prosecutorial immunity.

defendants, the decision was an administrative act necessary to the maintenance of the prosecution, *citing Ireland.* (App. at 46, 48.) The Sixth Circuit affirmed the district court's decision without comment.

The Sixth Circuit's statement in *Ireland* and the decision in this case conflict with previous rulings by this Court and risk the transformation of administrative personnel decisions into prosecutorial acts, even though such decisions would never subject a prosecutor to a malicious prosecution suit which is the historical basis for affording prosecutors absolute prosecutorial immunity.

Specifically, in *Imbler, supra,* 424 U.S. 409, the Court addressed whether a state prosecuting attorney acting within the scope of his duties in initiating and pursuing a criminal prosecution and presenting the State's case, was absolutely immune from suit in an action brought under section 1983. Using the same principles established in *Tenney,* the Court found that historically, prosecutors were immune from suit for malicious prosecution and special policy reasons, including intimidation from the performance of his public duties and the undue burden of retrying all criminal prosecutions in the context of section 1983 actions, supported a prosecutor's absolute immunity from suit. *Id.* at 420-28. The precise boundaries of the Court's holding, however, was expressly reserved, focusing on functional nature of the prosecutor's activities rather than his status, noting that it had no occasion to consider whether a prosecutor would be entitled to absolute immunity for administrative or investigative functions. *Id.* at 430-31.

This functional approach established in *Imbler* was necessary to the Court's holding since the basis for affording prosecutors absolute prosecutorial immunity was their historical immunity from malicious prosecution suits at

common law. Therefore, unless a prosecutor's function was prosecutorial in nature such that it could subject him to suit for malicious prosecution, there was no historical basis for affording him absolute prosecutorial immunity, and only qualified immunity would apply.

Using this functional approach, the Court subsequently found that prosecutors performing administrative or investigative functions were entitled only to qualified immunity, similar to the immunity historically afforded to their functional counterpart. *See, e.g., Burns, supra,* 500 U.S. 478 and *Buckley, supra,* 509 U.S. 259.

Significant to this analysis is the Court's decision in *Forrester v. White*, 484 U.S. 219 (1988). In *Forester*, the Court decided that a state-court judge was not entitled to absolute immunity for his decision to demote and dismiss a subordinate court employee pursuant to his statutory authority under Illinois law. *Id.* at 230. Recognizing its sparing recognition of claims to absolute immunity and applying the functional approach to the Judge's conduct, the Court determined that the judge was acting in an administrative capacity when he demoted and discharged the employee because although such acts may have been "quite important in providing the necessary conditions of a sound adjudicative system," they were not judicial or adjudicative acts. *Id.* at 229. Indeed, in an example cited by the Court, it stated:

> [A] judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as

> important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.

Id. Specifically, the Court stated that administrative decisions, even though they may be "essential to the very functioning of the courts," are not judicial acts. *Id.* at 228.

The functional approach in section 1983 cases against prosecutors is based on a prosecutor's historical immunity, and while the classifications between prosecutorial acts on the one hand and administrative and investigative acts on the other hand present some difficulty in application, the blurring of these distinctions can only create more difficulty. While personnel decisions, including the appointment of and delegation of authority to interested private attorneys in a criminal prosecution, may in some case be essential to the functioning of the prosecutor's office, they still are not prosecutorial acts and because such acts are unrelated to the initiation of a prosecution or any act of advocacy which would have exposed a prosecutor to suit for malicious prosecution at common law, only qualified immunity applies.

Because the Court in *Imbler* established a functional approach to determine the type of immunity available to prosecutors, and the Sixth Circuit has deviated from this functional approach to transform administrative personnel decisions into prosecutorial acts regardless of whether such acts are related to the initiation of the criminal charges or any act of advocacy which would have exposed a prosecutor to an action for malicious prosecution at common law, this Court should grant *certiorari* to expressly reject the Sixth Circuit's holding in *Ireland* and this case.

C. The Sixth Circuit Court Of Appeals' Plurality Opinion Expressed Contrasting Views On Whether The Petitioner's Constitutional Due Process Right To Be Free From Criminal Prosecution By A Prosecutor With A Direct And Substantial Financial Interest In Obtaining His Conviction Was Clearly Established For Purposes Of Qualified Immunity, Notwithstanding The Defendants' Actual Knowledge Of the Constitutional Prohibition Expressed In *Ganger v. Peyton* And Relevant Decisions Of This Court Which Clearly Condemned Such Practice And Foreshadowed The Constitutional Prohibition, And Because This Issue Addresses The Parameters Of Qualified Immunity In An Unresolved Context, This Court Should Grant Review To Settle An Important Question Of Federal Law.

The final issue presented in this petition addresses the parameters of when a Constitutional right is "clearly established" for purposes of deciding a defense of qualified immunity where a defendant has direct knowledge of and actually relies on an out of circuit opinion establishing that the intended conduct is a violation of due process under the Fourteenth Amendment of the United States Constitution and where the prior decisions of this Court clearly condemn such conduct and suggest a Constitutional violation under the circumstances known by the defendants to exist when the wrongful conduct is committed. As reflected by the sharply differing treatment afforded this issue by Judge Nelson and Judge Cole in the Sixth Circuit's plurality opinion, this issue should be resolved by the Court because it contains factors which have not been addressed in earlier decisions and invite markedly different views.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. *Id.* at 818. Specifically, the Court stated:

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

Id. at 819.

Justice Brennan, in a concurring opinion joined by Justice Marshall and Justice Blackmun, stated:

> I agree with the substantive standard announced by the Court today, imposing liability when a public-official defendant "knew or should have known" of the constitutionally violative effect of his actions. This standard would not allow the official who *actually knows* that he was violating the law to escape liability for his actions, even if he could not "reasonably have been expected" to know what he actually did know.

Id. at 820-21.

Justice Brennan's interpretation of the majority opinion in *Harlow* appears to be the holding adopted in *Malley, supra,* 475 U.S. 335, wherein the Court held that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law". *Id.* at 341.

Accord Hunter v. Bryant, 502 U.S. 224 (1991). *See also Butz v. Economou,* 438 U.S. 478 (1978) (decided prior *Harlow,* but holding there is no substantial basis for holding that executive officers generally may with impunity discharge their duties in a way that is known to them to violate the Constitution or in a manner that they should know transgresses a clearly established constitutional rule).

It is undisputed that Gibson knew that the private attorney defendants represented Mr. Fahey a contemporaneous civil action for $3 million arising out of the same facts as the criminal prosecution, and he was aware of the decision in *Ganger, supra,* 379 F.2d 709. In *Ganger,* the Fourth Circuit Court of Appeals expressly held that a prosecutor who criminally prosecuted a criminal defendant for assault while contemporaneously representing his wife in a divorce action violated the Constitutional due process rights of the criminal defendant because such contemporaneous representation constituted an actual conflict of interest which deprived the criminal defendant of the possibility of fair minded exercise of the prosecutor's discretion. *Id.* at 714.[4] Contemporaneous with his appointment of and delegation of authority to the private attorneys, Gibson's office actually enclosed a copy of *Ganger* to the private attorney defendants. Therefore,

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[4] *Ganger* was cited with approval in *State v. Bennett,* 798 S.W.2d 783 (Tenn. Crim. App. 1990), the only Tennessee case in 1995 to address the appointment of private attorneys pursuant to T.C.A. section 8-7-401 (1993). In *Bennett,* the Tennessee Court of Criminal Appeals expressly held that T.C.A. section 8-7-401 (1993) had not been unconstitutionally applied because, among other things, ***the private prosecutors did not represent the family of the victim in a civil case arising out of the occurrence which gave rise to the criminal prosecution.*** *Id.* at 786.

Gibson and the private attorney defendants were unequivocally aware that their proposed course of conduct had been found to violate the due process provisions of the Fourteenth Amendment of the United States Constitution.

While the Court in *Harlow* did not define the circumstances under which "the state of the law" should be evaluated by reference to existing caselaw, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court clarified this issue as follows:

> [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640.

The Sixth Circuit repeatedly has held that a Constitutional right is "clearly established" in this circuit where there is binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, ***or case law from other circuits which is directly on point***. *Blake v. Wright*, 179 F.3d 1003 (6th Cir. 1999); *Barrett v. Harrington*, 130 F.3d 246 (6th Cir. 1997); *Cameron v. Seitz*, 38 F.3d 264 (6th Cir. 1994); *Mumford v. Zieba*, 4 F.3d 429 (6th Cir. 1993); *Long v. Norris*, 929 F.2d 1111 (6th Cir. 1991); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Robinson v. Bibb*, 840 F.2d 349 (6th Cir. 1988); *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171 (6th Cir. 1988).

Ganger was directly on point, and the defendants had actual knowledge of its existence and its Constitutional

prohibition against the appointment of and delegation of authority to the private attorney defendants to criminally prosecute the petitioner. Nonetheless, they acted with impunity. These facts alone should be sufficient to overcome the defendants' entitlement to qualified immunity.

Moreover, when the private attorneys were appointed in the petitioner's criminal prosecution, most states in the United States had come to recognize the unconstitutionality of this conduct. For example, in 1994, Massachusetts, Michigan, Missouri, Nebraska, New York and Wisconsin prohibited any involvement by private prosecutors in criminal actions, (*see, e.g.*, *Commonwealth v. Gibbs*, 70 Mass. (4 Gray) 146, 147-48 (1855); *Meister v. People*, 31 Mich. 99, 106 (1875); *State v. Harrington*, 534 S.W.2d 44, 49-50 (Mo. 1976); *Flegge v. State*, 142 N.W. 276, 277 (Neb. 1913); *People v. Vlasto*, 78 Misc.2d 419, 355 N.Y.S.2d 983, 990-91 (Crim. Ct. 1974); *Biemel v. State*, 37 N.W. 244, 248-49 (Wis. 1888)), and a growing number of state courts and commentators had concluded that the use of private prosecutors in criminal cases almost invariably violates the Fifth and Fourteenth Amendments. *See, e.g.*, John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 514 (1994); Sidman, Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754, 794 (1976).

While a number of jurisdictions, like Tennessee, still permitted private attorneys *some* degree of participation in the prosecution of criminal cases, ***almost all such jurisdictions prohibited such participation where the private attorneys were representing the victims or their family in a related civil action at the same time, or where the attorneys had a pecuniary interest in the outcome of the case***. *See, e.g., Cantrell v. Commonwealth*, 329 S.E.2d 22, 26-27 (Va. 1985); *State ex rel. Koppers Co. v. Internat'l Union of Oil, Chem. & Atomic*

Workers, 298 S.E.2d 827, 831 (W. Va. 1982); *Born v. State*, 397 P.2d 924, 927 (Okla. Crim. App. 1964), *cert. denied*, 397 U.S. 1000 (1965); *State v. Basham*, 170 N.W.2d 238, 241 (S.D. 1969); *State v. Marshall*, 586 A.2d 85 (N.J. 1991); *Ganger v. Peyton*, 379 F.2d 709, 713 (4th Cir. 1967); *Dick v. Scroggy*, 882 F.2d 192, 198-99 (6th Cir. 1989) (Celebrezze, S.J., concurring in judgment); *See, e.g., Sinclair v. Maryland*, 363 A.2d 468 (Md. 1976); *People v. Jiminez*, 528 P.2d 913 (Colo. 1974); *State v. Detroit Motors*, 163 A.2d 227 (N.J. Sup. 1960); *United States v. Held*, 668 F.2d 1238 (D.C. Cir. 1981).

Moreover, prior decisions of this Court clearly condemned such conduct and suggested a Constitutional violation under the circumstances existing in this case. Specifically, in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 805, 809 (1987), the Court established "a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment," (*id.* at 814), even though the interested prosecutors did not have a *direct* financial interest in obtaining a contempt conviction. While *Young* was decided based on the Court's inherent supervisory powers, and not on Constitutional grounds, eight justices categorically condemned the practice and recognized that almost every state in the United States forbade the conduct. Four justices found the error so "fundamental" and "pervasive" as to undermine confidence in the integrity of the criminal proceeding, and four justices found the error violated Constitutional due process.

The Court further recognized that already in 1987, "when a private attorney is also interested in related civil litigation, ***the majority of states will not permit him to participate in a criminal prosecution.***" *Id.* at 805, 809 (*citing* Patricia Moran, Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the*

Federal Rules of Criminal Procedure, 54 Fordham L. Rev. 1141, 1155 and n. 57 (1986) (noting that "***only [one] 20th century case*** holds that a private prosecutor who also represents plaintiffs in a civil action arising out of the same proceeding presents no inherent due process or ethical problems," *citing Hopkins v. State*, 429 So.2d 1146, 1154 (Ala. Crim. App. 1983))). *See also Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) [Disqualifying federal prosecutor from participating in litigation in which he has a personal interest.]

While *Young* admittedly was not decided on Constitutional grounds, its strong condemnation provided ample reason to avoid such prohibited conduct, and prior decisions had suggested that contrary to the interested prosecutors in *Young,* prosecutors with ***a direct and substantial financial interest*** in obtaining a criminal conviction would be violative of Constitutional due process.

Specifically, in *Tumey v. Ohio,* 273 U.S. 510 (1927), the Court reversed criminal convictions for prohibition law violations rendered by the Mayor of North College Hill, Ohio, because the Mayor received supplements to his salary from the fees and costs levied by him against alleged violators. The Court held that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523.

While the Court has never held that prosecutors are subject to the same neutrality standards required of judges, they are nonetheless Constitutionally required to perform their prosecutorial functions fairly and in an unbiased manner. Indeed, in *Berger v. United States,* 295

U.S. 78 (1935), the Court reversed a criminal conviction based on prosecutorial misconduct which resulted in an unfair trial, describing a prosecutor as a "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern *impartially*. . ." *Id.* at 88.

In *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), the Court held that the reimbursement provision of § 16 (e) of the Fair Labor Standards Act (Act) did not violate due process by creating an impermissible risk of bias in the Act's enforcement and administration because the possibility that an assistant regional administrator might be tempted to devote an unusually large quantity of resources to enforcement efforts in the hope that he would ultimately obtain a higher total allocation of federal funds to his office was too remote to violate *"the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plaintiff-like functions."* *Id.* at 251-52.

Expressly because no governmental official stood to profit economically from the vigorous enforcement of the child labor provisions of the Act, and the salary of the assistant regional administrator was fixed by law, the Court found that the pressures relied on in such cases as *Tumey, supra,* 273 U.S 510; *Gibson v. Berryhill,* 411 U.S. 564, 579 (1973); and *Connally v. Georgia,* 429 U.S. 245, 250 (1977) (*per curiam*), were entirely absent. *Marshall, supra,* 446 U.S. at 250. However, the Court noted that:

> A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.

Id. at 249-50.

While the parameters of the financial interests necessary to violate Constitutional due process were not defined, *Marshall* clearly found that the holding in *Tumey* was applicable to prosecutors. Because *Tumey* prohibited a judge's direct financial interest in convicting a criminal defendant, these decisions clearly foreshadowed a Constitutional prohibition against prosecutors having a ***direct and substantial ($1 million) financial interest*** in obtaining a criminal conviction.

The Court's declarations of the circumstances prohibited by Constitutional constraints are precisely the circumstances known by Gibson and the private attorney defendants to exist when they criminally prosecuted the petitioner. Accordingly, because the state of the law was clearly established for purposes of qualified immunity during the events in question, none of the defendants would be entitled to qualified immunity under the circumstances of this case.

VII. CONCLUSION

For the foregoing reasons, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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September 17, 2003

VIII. APPENDIX

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1. Opinion, *Eldridge v. Gibson*, No. 01-6136 (6th Cir. filed June 19, 2003) ..... App. 1
2. Order and Memorandum, *Eldridge v. Gibson*, No. 2:95-0033 (M.D. Tenn. filed August 3, 2001) ..... App. 13
3. Order, *State v. Eldridge*, No. 93-75 (Putnam County Criminal Court filed September 6, 2000) ..... App. 55
4. Opinion, *State v. Eldridge*, 951 S.W.2d 775 (Tenn. Crim. App. filed May 7, 1997) ..... App. 58
5. T.C.A. section 8-7-106 ..... App. 85
6. Complaint, *Eldridge v. Gibson*, No. 2:95-0033 (M.D. Tenn. filed May 1, 1995) ..... App. 87

ELDRIDGE v. GIBSON, 332 F.3d 1019 (6th Cir. 2003)

FABIEN ELDRIDGE, PLAINTIFF-APPELLANT, v. WILLIAM E. GIBSON, DAVID DAY, ROBERT DURHAM, MICHAEL H. KNOWLTON, AND SAM LEE, DEFENDANTS-APPELLEES.

No. 01-6136.

United States Court of Appeals, Sixth Circuit.

Argued: March 11, 2003.

Decided and Filed: June 19, 2003.

Pursuant to Sixth Circuit Rule 206

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 95-00033 – William J. Haynes, Jr., District Judge.

ARGUED: Rick Halprin, Chicago, Illinois, for Appellant.

Martha A. Campbell, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, Samuel D. Payne, EVANS, JONES & REYNOLDS, Nashville, Tennessee, Jon E. Jones, LAW OFFICE OF JON E. JONES, Cookeville, Tennessee, Daniel H. Rader III, MOORE, RADER, CLIFT & FITZPATRICK, Cookeville, Tennessee, for Appellees.

ON BRIEF: Rick Halprin, Chicago, Illinois, Chantal M. Eldridge, Cookeville, Tennessee, for Appellant.

Martha A. Campbell, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, Samuel D. Payne, Winston S. Evans, EVANS, JONES & REYNOLDS, Nashville, Tennessee, John E. Jones, LAW OFFICE OF JON E. JONES, Cookeville, Tennessee, Daniel H. Rader III, Richard Lane Moore, MOORE, RADER, CLIFT & FITZPATRICK, Cookeville, Tennessee, for Appellees.

GILMAN, J., delivered the opinion of the court. NELSON, J. (pp. 7-9), delivered a separate opinion concurring in the judgment. COLE, J. (pp. 10-12), delivered a separate opinion concurring in part and dissenting in part.

Before: NELSON, COLE, and GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge.

In May of 1995, Fabien Eldridge brought this action for damages under 42 U.S.C. § 1983 against the following defendants: William E. Gibson, District Attorney General for the Thirteenth Judicial District of Tennessee; David Day, a private attorney; Robert Durham, a private attorney; Michael Knowlton, a private attorney; and Sam Lee, a deputy sheriff for Putnam County, Tennessee. District Attorney Gibson and Deputy Sheriff Lee were sued in both their individual and official capacities.

Eldridge's claims arise out of his state criminal prosecution that initially resulted in a second-degree murder conviction. The conviction, however, was subsequently vacated on appeal, *State v. Eldridge,* 951 S.W.2d 775 (Tenn.Crim.App. 1997), and the case against him was dismissed on remand. Specifically, Eldridge claims that the state's appointment of Day, Durham, and Knowlton (the private-attorney defendants) to serve as special prosecutors in his criminal trial violated his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. The private-attorney defendants not only served as special prosecutors, but also represented the crime victim in a civil action for damages against Eldridge.

Shortly after Eldridge filed his initial complaint, all of the defendants filed motions to dismiss. Gibson and Lee

also filed motions for summary judgment. Judge Morton stayed discovery and granted the defendants' motions to dismiss on the ground that Eldridge's complaint was premature under *Heck v. Humphrey,* 512 U.S. 477, 486-87 (1994) (holding that, to recover damages, a § 1983 plaintiff raising a malicious-prosecution-type claim must prove that his "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus"). Upon Eldridge's motion for reconsideration, Judge Morton vacated his prior ruling for the limited purpose of considering Eldridge's § 1983 claim for abuse of process, and issued an order to show cause why Lee should not be dismissed as a defendant. Eldridge filed a response to the show-cause order and further requested that the court take judicial notice of numerous exhibits from his criminal trial. At that point, Judge Morton stayed the case pending the disposition of Eldridge's criminal appeal.

In October of 2000, Eldridge petitioned the district court to reopen the case because the criminal proceeding against him had been dismissed. Eldridge simultaneously filed a Notice of Voluntary Non-Suit against Lee and a motion for summary judgment against Gibson and the private-attorney defendants. On August 3, 2001, Judge Haynes (who had taken over the case following Judge Morton's death) entered an order denying Eldridge's motion for summary judgment and dismissing Eldridge's complaint against all of the defendants with prejudice.

Judge Haynes's 31-page opinion offers a thorough explication of the law applicable to this case and reaches the correct result. After independently researching and

analyzing the issues presented, I am convinced that Judge Haynes's opinion provides a cogent and exhaustive analysis that would not be further elucidated by a rehashing of the issues here.

In short, as Judge Haynes has explained, defendants Gibson, Day, Durham, and Knowlton are entitled to absolute immunity from suit because of the prosecutorial nature of their actions in question. Eldridge argues that the fact that the special prosecutors were paid by the victim rather than the state makes the special prosecutors ineligible for prosecutorial immunity. As the district court correctly noted, however, this is not the correct inquiry. Under Supreme Court precedent, the test for determining if absolute prosecutorial immunity is appropriate turns on "the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons,* 509 U.S. 259, 269 (1993).

The dissent acknowledges that the functional test is the appropriate analysis, but concludes that the actions of the special prosecutors in this case "were not merely in the context of a state criminal trial, but also in the context of a private civil trial." According to the dissent, some of the prosecutorial actions taken by the special prosecutors in the criminal trial might have been "motivated by the civil ramifications," which in the dissent's opinion would then make those actions not prosecutorial in nature for purposes of the functional test. But this reasoning requires precisely the type of inquiry into motive that the doctrine of absolute immunity is intended to prevent. As this court has previously held, "absolute immunity provides complete protection from judicial scrutiny of the motives for the prosecutors' actions." *Ireland v. Tunis,* 113 F.3d 1435, 1447 (6th Cir. 1997) (holding that the prosecutor was entitled to

absolute immunity notwithstanding alleged political motivations for his actions); *cf Mowbray v. Cameron Co., Tex.*, 274 F.3d 269, 276 (5th Cir. 2001) ("It is a well established rule that where a judge's absolute immunity would protect him from liability for the performance of particular acts, mere allegations that he performed those acts pursuant to a bribe or conspiracy will not be sufficient to avoid the immunity."). Courts have found this protection necessary because of the fact that retaliatory suits by defendants "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Imbler v. Pachtman*, 424 U.S. 409, 425-26 (1976).

Both the dissenting and concurring opinions correctly point out that we have never before been confronted by a situation where the prosecutor was simultaneously handling a civil case against the defendant. Although the potential conflict of interest this creates may well be unwise, as the state of Tennessee recognized after Eldridge's criminal conviction was overturned on this ground, the test for determining whether absolute immunity applies for the purposes of § 1983 remains the same even in the face of unsound policy. I therefore agree with the district court that the special prosecutors were in fact functioning as prosecutors during the criminal trial, and decline to inquire into whether the potential conflict of interest inherent in this situation resulted in the prosecutors having improper motives in so doing.

Eldridge's argument that the Thirteenth Judicial District is a "person" subject to suit under § 1983 also fails because, as Judge Haynes discussed, the Thirteenth Judicial District is clearly a branch of the state and as

such is protected from suit by the Eleventh Amendment. We further conclude that the district court's dismissal of Eldridge's Fourth, Fifth, and Sixth Amendment claims was supported by the record. Moreover, whether the dismissal of these claims was erroneous or not is irrelevant in light of the district court's subsequent immunity analysis. Finally, the district court did not abuse its discretion in dismissing the claims against Lee with prejudice, particularly given the state court's analysis of Lee's actions and the fact that Lee's pending motion for summary judgment precluded Eldridge from voluntarily dismissing his lawsuit without prejudice. Fed.R.Civ.Pro. 41(a).

The judgment of the district court is therefore **AFFIRMED** for all of the reasons set forth above.

CONCURRENCE

DAVID A. NELSON, Circuit Judge, concurring in judgment.

Although I concur in the court's judgment, my rationale differs in part from that employed in the lead opinion.

Whether the doctrine of absolute immunity should be extended to private contingent-fee lawyers employed by a crime victim to carry a second brief as "special prosecutors" under T.C.A. § 8-7-401 is a question both novel and (for me, at least) difficult. It is true that such lawyers perform a prosecutorial function – and if that were the end of the story, there would be no question about their entitlement to absolute immunity. It is also true, however, that in addition to functioning as prosecutors, they function as counsel in a private action for damages. As the Tennessee

Court of Criminal Appeals demonstrated convincingly in *State v. Eldridge,* 951 S.W.2d 775 (1997), such special prosecutors have "inherent conflicts of interest" that are both "obvious and irreconcilable." *Id.* at 783.

In the very nature of things, the role of a special prosecutor under T.C.A. § 8-7-401 invites the contingent-fee lawyer who assumes that role to employ the coercive force of the state's criminal justice machinery for an illicit purpose – squeezing the defendant in the criminal case until he coughs up enough money to satisfy the plaintiff in the private lawsuit. A plausible argument can be made, it seems to me, that for the private lawyer to act as a special prosecutor under the circumstances presented here is *ipso facto* to engage in an unconstitutional abuse of process. And if that argument were to be accepted, it would be hard for me to discern any rational justification for extending absolute immunity to the special prosecutor.

Be that as it may, I find it unnecessary to reach a firm conclusion on the absolute immunity issue. If the doctrine of absolute immunity does apply in a situation such as this, that is the end of the matter as far as the private-attorney defendants are concerned. If the absolute immunity doctrine does not apply, the question shifts to whether the private attorneys are entitled to dismissal on qualified immunity grounds. I believe they are – so at the end of the day, it seems to me, the private attorneys ought to prevail one way or the other.

Under the doctrine of qualified immunity, officials performing discretionary functions of the sort at issue here "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). This entitlement to be shielded from liability, as the Supreme Court made clear in a subsequent case, is not simply a "defense to liability;" it is "an *immunity from suit*. . . . " *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

In analyzing qualified immunity claims, we are normally constrained to follow a rigid sequence: first we ask whether a constitutional right would have been violated on the facts alleged, and only if that question is answered in the affirmative do we ask whether the constitutional right was clearly established. See *Saucier v. Katz,* 533 U.S. 194, 201 (2001). An important reason – if not the sole reason – for turning first to the existence or nonexistence of a constitutional right is that "the law's elaboration from case to case" might suffer "were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful. . . . " *Id.*

Given the divergent positions taken by my colleagues on the panel in this particular case, I believe I am free to skip ahead to the easy question of whether the special prosecutors acted in violation of a right that was clearly established, thus declining to answer the difficult question of whether Fabien Eldridge had a constitutional right not to be prosecuted criminally by contingent-fee lawyers who were also suing him civilly. Neither of my colleagues having answered the latter question, I would not be speaking for the court if I ventured to pontificate on how the issue should be resolved – and the world would still be without a definitive elaboration of the relevant law.

If the right claimed by Mr. Eldridge existed at all, I obviously do not believe it was clearly established. At the time of Eldridge's prosecution a Tennessee statute

explicitly allowed crime victims to employ private legal counsel to act as special prosecutors, and there was no judicial decision teaching that it would be a constitutionally impermissible abuse of process under federal law for Eldridge's lawyers in the tort case to accept appointment as special prosecutors and to function as such under the authorization of the statute. On that narrow ground, and being satisfied that the private-attorney defendants would ultimately have to prevail if this case were to be remanded for further proceedings, I am content to concur in the judgment announced by the lead opinion with respect to the dismissal of the private-attorney defendants. Like Judge Cole, I concur in both the judgment and the opinion as far as the remaining issues are concerned.

CONCURRING IN PART, DISSENTING IN PART

R. GUY COLE, JR., Circuit Judge, concurring in part and dissenting in part.

I concur in the lead opinion with regard to each issue except for the grant of absolute immunity to the special prosecutors; on that issue only, I respectfully dissent.

I find the district court's rationale for granting absolute immunity, upon which the lead opinion relies, to be unpersuasive.

Eldridge asserts that Tennessee Code § 8-7-401 does not provide for any immunities to private legal counsel appointed pursuant to this statute, and argues that the legislative omission of any mention of immunities is not an error, but an intentional distinction between privately employed attorneys permitted to participate in criminal prosecutions at the District Attorney's discretion, and

individuals appointed and employed by the State pursuant to T.C.A. § 8-7-106.

In support of this proposition, Eldridge quotes from § 8-7-106, which states that a district attorney pro tem, appointed in the absence of a District Attorney, shall be entitled to the same privileges and emoluments. Thus, Eldridge juxtaposes these two statutory provisions to demonstrate that the Tennessee legislature would have provided a similar entitlement to private counsel under § 8-7-401 had immunity for such attorneys been desired.

The district court stated that § 8-7-106, "does not grant or refer to any immunity, only privileges of office." This is unpersuasive, however, because, in my view, absolute immunity would properly be considered a privilege of office. The district court cites no authority to the contrary.

In addition, the district court asserted that under *Martinez v. California,* 444 U.S. 277, 284 n. 8 (1980), state law does not control resolution of federal § 1983 actions. This appears to be a fair reading of the implication of *Martinez.* However, this factor cuts both ways. If state law does not control, then the fact that the private attorneys were appointed pursuant to a state statute also cannot control – but the district court heavily relied on this factor.

I am unaware of any instance in which a federal court has granted absolute immunity to private attorneys acting as prosecutors in a criminal case while simultaneously representing the crime victim civilly. It is true that this Court has taken a functional approach to absolute immunity, assessing the "nature of the function performed, not the identity of the actor who performed it" in determining whether to grant absolute immunity. *See Higgason v.*

Stephens, 288 F.3d 868, 877 (6th Cir. 2002). Using this approach, we have concluded that a prosecutor is protected "in connection with his duties in functioning as a prosecutor." *Id.*

Applying the functional approach, the district court stated that the private attorneys "acted as prosecutors in representing the state in a criminal case, arguing pretrial and trial matters. These are the inherent functions of a prosecutor and these functions were in the context of a state criminal trial." The district court concluded, "Thus, applying the function analysis . . . the private Defendants were state prosecutors and are also entitled to absolute immunity for their work on Plaintiff's criminal trial."

Were the attorneys in question functioning solely as special prosecutors, this analysis would surely be correct. The problem here, however, is that these functions were not merely "in the context of a state criminal trial," but also in the context of a private civil trial. The Tennessee Court of Criminal Appeals noted a number of important considerations in this regard that are relevant to the conflict of interest in this case. "The responsibility of a public prosecutor differs from that of the usual advocate in that it is the public prosecutor's duty to seek justice, not merely to convict." *State v. Eldridge,* 951 S.W.2d 775, 781 (Tenn.Cr.App. 1997). At the same time, "[a]s zealous advocates representing the victim in the civil case, counsel would best serve the victim by securing a criminal conviction." *Id.* at 783. Among other troubling issues, there was an unresolved factual dispute regarding whether the special prosecutors had offered to settle both the civil and criminal proceedings for a sum certain, and it was apparent that payment of a sum of money for a civil settlement would have resulted in a favorable recommendation by the

special prosecutors in the criminal matter. *See id.* "[T]he special prosecutors certainly had a direct interest in the outcome." *Id.*

Because of these conflicts, I do not think it can fairly be said that the private attorneys were at all times functioning as state prosecutors, because all of their actions in the context of the criminal trial were inextricably intertwined with their civil functions. Accordingly, the functions of prosecutor and zealous civil advocate are inseparable here. Thus, the district court's functional analysis was incomplete.

I would find that the private attorneys are not entitled to absolute immunity because they functioned simultaneously as both prosecutors and private civil advocates, and would remand this issue to the district court to determine in the first instance whether these attorneys were entitled to qualified immunity.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

FABIEN ELDRIDGE, Plaintiff,	)	
v.	)	No. 2:95-0033
	)	JUDGE HAYNES
WILLIAM E. GIBSON, et al., Defendants.	)	

ORDER

In accordance with the Memorandum filed herewith, Plaintiff's requests for judicial notice (Docket Entry No. 36 and 42) and the Plaintiff's motions for summary judgment against the Defendant William Gibson (Docket Entry No. 44) and the Defendants David Day, Michael Knowlton and Robert Durham (Docket Entry No. 47) are hereby **DENIED**. The Defendants David Day's and Michael Knowlton's motion to dismiss (Docket Entry No. 97) is hereby **GRANTED**. Plaintiff's claim against all of the named Defendants, including Defendant Sam Lee are hereby **DISMISSED** with prejudice. Each party shall bear his own costs.

This Order constitutes the Final Order in this action.

It is so **ORDERED**.

ENTERED this the 3rd day of August, 2001.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

FABIEN ELDRIDGE, Plaintiff, v. WILLIAM E. GIBSON, et al., Defendants.	)	No. 2:95-0033 JUDGE HAYNES

MEMORANDUM

Plaintiff Fabien Eldridge, filed this action for damages under 42 U.S.C. § 1983 against the Defendants[1]: William E. Gibson, District Attorney General for the Thirteenth Judicial District of Tennessee; Ben Fann, Assistant District Attorney General for that district; David Day, a private attorney; Michael Knowlton, a private attorney; Robert Durham, a private attorney and Sam Lee, a deputy sheriff for Putnam County, Tennessee. Defendants Gibson, Fann and Lee are sued in their individual and official capacities. Plaintiff's claims arise out of his state prosecution that initially resulted in a second-degree murder conviction that was subsequently vacated on appeal. Upon remand, the criminal charges against Plaintiff were dismissed.

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[1] The complaint also named John Doe Defendants that are not parties cognizable under the Federal Rules of Civil Procedure and the Court does not deem them to be party Defendants. *Wiltsie v. California Dept. of Correction*, 406 F.2d 515, 517 (9th Cir. 1969).

Plaintiff's specific claims are that the Defendants who are private attorneys, were appointed by the Defendant Gibson to serve as state prosecutors in Plaintiff's criminal trial without prior notice to the Plaintiff nor an opportunity for a hearing on their appointment. The private attorney Defendants who were appointed as special prosecutors also represented the victim in the criminal trial in the victim's civil action for damages against the Plaintiff. During their service as special prosecutors, these Defendants allegedly negotiated settlement of the civil and criminal trials and allegedly lost or destroyed exculpatory evidence. In sum, Plaintiff alleges violations of his Fourth, Fifth, Sixth and Fourteenth Amendment rights. Plaintiff also alleges a loss of his liberty and property interests as well as damages to his reputation and credibility as a result of the Defendants' unlawful conduct in this state prosecution.

In earlier proceedings, the late Honorable L. Clure Morton concluded that the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), precluded this Section 1983 damage action by the Plaintiff until such time as the then pending state criminal case was successfully concluded in the Plaintiff's favor. (Docket Entry Nos. 25 and 26). The Court, however, granted in part a motion to reconsider. (Docket Entry No. 33).

Although the Court reopened the action, it was "for the limited purpose of considering the abuse of process claim." *Id.* at p. 2. In the latter Order, Judge Morton allowed the Plaintiff to proceed on the use of the legal process for wrongful purpose, i.e., the use of "special prosecutors . . . to criminally prosecute the plaintiff to better their legal position in an contempt civil action in which they represented the victim of the crime." *Id.* Judge

Morton observed that this latter abuse of process claim "was not dependent on the reversal of the Plaintiff's state conviction." *Id.* Judge Morton, however, stated his intention to abstain from hearing this claim, if the Plaintiff raised this issue in his state criminal proceeding. *Id.* The Court directed the Plaintiff to file portions of the state criminal court record to reflect whether the Plaintiff was challenging the appointment of special prosecutors. *Id.* The Plaintiff was also directed to show cause why the Defendant Lee should not be dismissed "given the fact that only the claim of abuse of process is defined." *Id.*

In response to the Court's Order (Docket Entry No. 39), the Plaintiff asserted, in sum, that the claim against the Defendant Lee was for his "failure to preserve the fourth knife" and that "the Defendants could not have gained an unfair advantage in the civil case without the Defendant Lee's failure to preserve the fourth knife." In these papers, the Plaintiff cited only state law on his abuse of process claim. *Id.* at p. 11 citing *Deposit Recovery Corporation v. Santini*, 765 S.W.2d 764 (Tenn.App. 1988). Subsequently, Judge Morton stayed this action pending the completion of the appeal of Plaintiff's criminal case. (Docket Entry No. 39).

On October 10, 2000 the Plaintiff petitioned to reopen this action, citing the Tennessee Court of Criminal appeals' reversal of his conviction, *State v. Eldridge*, 951 S.W.2d 775 (Tenn.Crim.App. 1997), and state trial court's subsequent dismissal of the criminal charge. (Docket Entry No. 41). The Court granted the petition to reopen. (Docket Entry No. 105). The Plaintiff also filed a notice of nonsuit against the Defendants Fann and Lee. (Docket Entry No. 43). The Defendant Lee objected to the dismissal unless the dismissal was with prejudice. (Docket

Entry No. 54). The Plaintiff later filed a stipulation of dismissal as to Fann. (Docket Entry No. 92). The Court set oral argument on all pending motions.

Before the Court are the following motions[2]: (1) Plaintiff's requests for judicial notice (Docket Entry Nos. 36 and 42); (2) Plaintiff's motion for summary judgment against Defendant Gibson (Docket Entry No. 44); (3) Plaintiff's motion for summary judgment against Defendants Day, Knowlton and Durham (Docket Entry No. 47); and (4) the Defendants Day's and Durham's motion to dismiss (Docket Entry No. 97) to which responses have been filed, (Docket Entry Nos. 63, 65 through 74, 77 through 80, 94 and 95), to which the Plaintiff has replied. (Docket Entry Nos. 83 through 88, 90 and 91).

In his motions for summary judgment, Plaintiff contends, in essence, that the facts and legal issues decided in the state court proceedings can be used as offensive collateral estoppel to establish that the private attorney Defendants and Gibson violated the Plaintiff's due process rights to a fair trial by allowing the latter Defendants to represent simultaneously the state in the criminal prosecution and the victim in a civil action for damages. The Defendant Gibson's appointment of these attorneys violated Gibson's office policy and allegedly clearly established legal precedents on the Plaintiff's

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[2] In recent filings (Docket Entry No. 63) and at oral argument, the Defendants refer to their earlier motions to dismiss (Docket Entry Nos. 5, 8, 12 and 15), but Judge Morton's Order of dismissal actually granted those motions. (Docket Entry No. 25 and 26). The Defendants Day and Durham subsequently moved to renew their earlier motion to dismiss. (Docket Entry No.97).

Fourth, Fifth, Sixth and Fourteenth Amendment rights to a fair trial. In Plaintiff's view, the Defendant Gibson is not entitled to either absolute or quasi-judicial or qualified immunity on his decision to appoint private attorneys. Gibson's decision to appoint these private attorneys allegedly represents the decision of the District that he serves, thereby entitling Plaintiff to damages against Gibson in his official capacity. Except for the last argument, the same contentions are advanced against the private attorney Defendants for violation of Plaintiff's due process rights to a fair trial arising out of their joint representation of the state and the victim.

In response, the Defendants assert that they are entitled to absolute or quasi-judicial immunity by reason of their services as state prosecutors in the Plaintiff's criminal trial. Defendants assert that the appointment process of special prosecutors is authorized by state statute that had been upheld as constitutional by the state appellate court. The state trial court also approved their appointment and the Plaintiff's counsel did not object to these appointments at his criminal trial. The Defendant Gibson also contends that the claims against him are time barred.

For the reasons set forth below, the Court concludes that the Plaintiff's requests for judicial notice should be denied because the Federal Rules of Evidence and Civil Procedure require certification of such public records. The Court also concludes that the Plaintiff's motions for summary judgment should be denied and the Defendant Day's and Durham's motion to dismiss should be granted. These attorney defendants are entitled to absolute immunity because they were serving prosecutorial functions in a judicial proceeding and acted pursuant to a state statute

with the approval of the state trial court. Even if the facts show violations of Plaintiff's constitutional rights to a fair trial, as prosecutors, the absolute immunity doctrine bars this damages action against them. Finally, given the record of these proceedings, the suit against the Defendant Lee should be dismissed with prejudice.

A. Motion for Judicial Notice

The Plaintiff has filed requests for judicial notice (Docket Entry Nos. 36 and 42) requesting the Court to take judicial notice of the state trial court records in Plaintiff's criminal trial. As a rule, public records should be certified to be considered as evidence, including as evidence on a motion for summary judgment. Fed.R.Evid. 902, 1005 and Fed.R.Civ.P. 56(e). From the Court's review, the state trial court's record are not certified. While the Court can take judicial knowledge of its own records, this Court declines to take judicial knowledge of state court records. Absent proper certification, the Court declines to take judicial notice of the state court records. Thus, the Plaintiff's requests for judicial notice (Docket Entry Nos. 36 and 42) are denied.

B. Motions for Summary Judgment and to Dismiss

1. Review of the Record[3]

According to the Tennessee Court of Criminal Appeals, the facts underlying the Plaintiff's state criminal charges are that "the [Plaintiff] was angry at the victim over something that happened to the [Plaintiff's] sister. [Plaintiff] entered the victim's residence with what appeared to be a knife. Upon being summoned to the scene, the officers discovered [Plaintiff] beating the victim. The victim was covered with blood and had lacerations on his face. The knife was found on the couch." *State v. Eldridge*, 951 S.W.2d 775, 776 (Tenn.Crim.App. 1997) (a copy of which is attached to Docket Entry No. 41, Attachment No. 1 thereto at p. 3).

In an appeal of his original conviction, the Plaintiff asserted a *Brady*[4] violation for the loss of a knife. The Tennessee appellate court described the facts relating to this claim.

> The Defendant claims that his rights under the Constitutions of the United States and the State of Tennessee were violated by the state's

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[3] This section does not represent finding of facts, but is an analysis of the factual circumstances supported by the record to resolve the Defendants' immunity contentions. The Court notes that the state court filings submitted by the Plaintiff are not certified as required by Fed.R.Civ.P. 56(e) that requires "sworn or certified copies of all papers or parts thereof referred to an affidavit shall be attached thereto or served therewith." The Court also declines to decide the offensive collateral estoppel issue until after the immunity issues are resolved.

[4] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

loss of an allegedly blood-covered knife. He specifically argues that the state violated the standards for disclosing exculpatory evidence set forth in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Alternatively, he alleges that the state acted in bad faith in its handling of the knife in violation of *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

When the defendant was arrested, Deputy Sam Lee allegedly recovered four knives from the home of the victim. Deputy Lee apparently never sent the knives to be tested for blood and fingerprints. When the defense viewed the physical evidence prior to trial, one of the knives was missing.

A. BRADY V. MARYLAND

The defendant argues that the state did not disclose that the fourth knife recovered from the home of the victim was blood-covered and had been misplaced. He contends that Deputy Lee knew of the possibly exculpatory nature of the knife by placing it in a separate bag from the other knives. He claims the blood on the knife could be that of the co-defendant who intervened to protect the defendant from the victim, thereby supporting the defense that the victim was the first aggressor. Thus, he urges that "[t]hese facts were plainly 'favorable' to the defendant and would have been 'material' to his defense."

* * *

The defendant knew as early as the preliminary hearing that four knives actually existed and that one or two of the knives had

blood on them. Defense counsel asked Deputy Lee about the knives at the preliminary hearing as follows:

Q: "Did you find four kitchen-type knives at the scene with blood on them?"

A: "I found one I know for sure, I think possibly two, kitchen knives in the living room area with blood on them."

. . . .

Q: "Did you take into your possession four – a total of four kitchen knives?"

A: "Yes, I did."

Q: "One of which was blood covered and the other one you think had blood on it?"

A: "Yes."

Similarly, the defense was also aware at trial that one of the knives was missing. The defense investigator viewed the physical evidence the day before trial. Although he knew that four knives had been seized by the Sheriff's Department, only three knives were produced. All of the knives were dirty, but only one had what appeared to be blood, food, or rust on it.

We conclude that Brady was not violated in this case. The defense was aware that four knives were seized from the scene and that there was blood on at least one of the knives. Further, the defense knew at trial that one of the knives was missing from the physical evidence. The state did not suppress any of this information. The defense made no objections during trial,

> *nor did they ask that any of the knives be tested. Therefore, we find no merit to this issue.*

951 S.W.2d at 777-78 (emphasis added).

On a related claim that the state officials failed to preserve the evidence, the Tennessee appellate court ruled as follows:

> In the alternative, the defendant argues that the state exhibited bad faith in its failure to preserve the fourth knife as potentially useful evidence. Therefore, he claims that the state infringed on his right to due process of law under *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).
>
> In *Arizona v. Youngblood*, the Supreme Court majority held that failure to preserve potentially useful evidence can be a denial of due process if the defendant can show bad faith on the part of the police. The Court noted that the presence of bad faith necessarily turns on the police's knowledge of the exculpatory nature of the evidence at the time it is lost or misplaced. *Id.* at 56, 109 S.Ct. at 336.
>
> In this case, we are confronted with many differing stories as to the nature of the missing knife. It is unclear from the preliminary hearing, the testimony at trial, and the post-trial testimony and affidavits whether or not there was blood on the knife. Deputy Lee stated at the preliminary hearing that maybe two knives were covered in blood. However, at the hearing on the motion for new trial, Deputy Lee claimed that only one knife had blood on it, and he kept it separate from the others. Furthermore, the day before trial, the defense saw only

> three knives, one of which possibly had blood on it. Consequently, we are left to speculate as to the exculpatory nature of the missing knife.
>
> *In any event, the defendant has not demonstrated that the police acted in bad faith in its misplacement of the knife. The mere fact that it is missing is not an indicia of bad faith. Deputy Lee was not aware of any exculpatory value of the knife at the onset. Any error on the part of the state was merely negligence. Accordingly, we find no violation of Arizona v. Youngblood.*

951 S.W.2d at 778 (emphasis added).

The Tennessee Court also cited the following facts on the appointment of special prosecutors and their conduct in Plaintiff's state criminal proceeding.

> **A. Involvement of the Special Prosecutors**
>
> Approximately seven (7) months prior to the criminal trial, the victim's private attorneys filed a civil lawsuit against the defendant seeking $1,000,000 in compensatory damages and $2,000,000 in punitive damages for injuries arising from the same incident prosecuted in the criminal case. Approximately two (2) weeks prior to the trial the district attorney general by letter to the special prosecutors (1) confirmed the participation of the special prosecutors; (2) advised that various items of evidence would be delivered to the special prosecutors; (3) stated that defense discovery would be completed through the office of the special prosecutors; (4) enclosed a copy of *Ganger v. Peyton*, 379 F.2d 709 (4th Cir.1967), "setting forth some limitations for special prosecutors who are handling a civil case

arising out of the same offense;" and (5) "decline[d] any further involvement due to our busy schedules, other than the requirements of *Ganger* and T.C.A. § 8-7-401."

Prior to trial the special prosecutors served several motions on defense counsel. At trial the special prosecutors conducted the voir dire, argued all pre-trial motions, gave the opening statement, handled motions and objections, examined every witness for the prosecution and defense, and delivered the primary closing argument. The only active involvement by the assistant district attorney general was making the rebuttal argument required by T.C.A. § 8-7-401 at which time the assistant district attorney stated to the jury:

> "... I've been here watching two young prosecutors, special prosecutors, and three young defense attorneys, but the law says I have to come up here and give the last argument because I'm an Assistant District Attorney."

At no time prior to trial or during trial did defense counsel raise any objection to the participation by the special prosecutors. It was not until the defendant retained other counsel to represent him on the motion for new trial that the issue was first raised in the trial court. In denying the motion for new trial, the trial judge found that the special prosecutor issue had been waived by the failure to object. Based upon the "affidavits and oral testimony of the District Attorney and the Special Prosecutors given in response to this motion," the trial

judge found that the district attorney maintained appropriate control of the prosecution of the case.

* * *

The special prosecutors endeavored to take an audio/visual deposition of defendant in the civil case just prior to the criminal trial. This, of course, is not allowable in the criminal prosecution. It resulted in an order from the civil tribunal authorizing the taking of the depositions; provided, however, the state would not be permitted to use at the criminal trial any portion of the depositions involving Fifth Amendment assertions.

There was a factual dispute as to whether the special prosecutors had offered to settle both the civil and criminal proceedings for a sum certain; however, this factual dispute was not resolved by the trial court. Nevertheless, the affidavit of one of the special prosecutors indicates that he discussed the possibility of settlement with the victim and was advised that the victim would settle for $250,000 to $300,000, "but he wanted Mr. Eldridge to do some time in jail." The affidavit reveals that the special prosecutor then advised defense counsel of the settlement offer of $250,000 to $300,000 for the civil case, " and that we would have no objection to Mr. Eldridge pleading to a lesser included felony offense, possibly aggravated assault, but that settlement of the criminal matter would be left up to the district attorney's office." Therefore, it is apparent that payment of this sum of money by the defendant would result in a favorable recommendation of the special prosecutors in the criminal matter.

> Also of significance are the pecuniary advantages that could benefit the special prosecutors. Although it is unclear from the record how the special prosecutors were to be compensated in either the civil or criminal case, the special prosecutors certainly had a direct interest in the outcome of the criminal proceeding.
>
> The inherent conflicts of interest of the special prosecutors are indeed obvious and irreconcilable. Furthermore, although it is unnecessary to reach the issue as to whether the district attorney general retained adequate control of the prosecution, it is at least apparent that the special prosecutors had virtually total control of the trial proceeding. The only participation by the assistant district attorney general was in making the rebuttal argument which he acknowledged to the jury he was doing since "the law says I have to come up here and give the last argument because I'm an Assistant District Attorney." It would appear the public prosecutor followed his commitment set forth in his letter to the special prosecutor declining "further involvement due to our busy schedules, other than the requirements of *Ganger* and T.C.A. § 8-7-401."
>
> We therefore, conclude that defendant's rights under the United States and Tennessee Constitutions were violated under these circumstances.

Id. at 779-80, 783 (footnotes and citations omitted).

In closing on the special prosecutors issue, the Tennessee Court of Criminal Appeals concluded that

Although *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) strongly condemned interested counsel serving as special prosecutors, the Court avoided the necessity of reaching the constitutional issue since it relied upon its inherent supervisory authority in condemning the practice. *Young*, 481 U.S. 809, 107 S.Ct. at 2138-2139. Obviously, this does not preclude and probably only foreshadows a constitutional bar with respect to the use of interested private prosecutors. Bessler, The Public Interest at 571. In fact, the United States Supreme Court had earlier considered the due process implications of prosecutorial functions. In *Marshall v. Jerrico*, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), the court found no due process violation since no prosecutorial officials stood to benefit financially, and there was no realistic possibility that prosecutorial decisions would be "distorted" by improper influences. Id. at 250, 100 S.Ct. at 1617. However, the Court left open the possibility of due process violations where enforcement decisions are motivated by personal interest, financial or otherwise. *Id.* at 249-250, 100 S.Ct. at 1616-1617.

* * *

We have no hesitation in concluding that the participation by special prosecutors who represent the victim in a civil matter arising from the same incident giving rise to the criminal prosecution is a violation of the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the Untied States Constitution as well as the Law of the Land

> provision in Article I, § 8 of the Tennessee Constitution.

Id. at 782.

In sum, the Court considered these appointments to be "fundamental error" that the Court had to remedy despite Plaintiff's failure to object at trial. *Id.*

As to the appointment of a special prosecutor, at the time of Plaintiff trial[5], Tenn. Code Ann. § 8-7-401(a) authorized employment of private counsel for the crime victim to serve as co-counsel in the prosecution of the crime.

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[5] After Plaintiff's trial, the Tennessee legislature in 1995 added to Section 8-7-401 the following additional subsections requiring prior notice and a hearing on this appointment, but otherwise retained the option of appointment

> (b)(1) No private legal counsel employed as a special prosecutor pursuant to subsection (a) is permitted to participate in any criminal hearing, trial or other proceeding unless te [sic] defendant or defendants have been notified and the court has conducted a hearing on such employment as provided in this subdivision (b)(2).
>
> (2) At such hearing, the defendant or defendants have the right to present and to raise and preserve any objections to the employment of such special prosecutor as provided by law. The court shall examine the private counsel to be employed and shall make a specific finding as to whether such person is or is not qualified under the law to serve as special prosecutor and as to whether such person has or does not have a conflict of interest as provided by law.
>
> (3) Any allegations of prosecutorial misconduct or other defects in the trial committed or caused by the special prosecutor shall be raised and disposed of at the time a motion for new trial is made by the defendant.

Tenn. Code Ann. § 8-7-401(b)(1) through (3).

> (a) A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or the district attorney general's deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general. The district attorney general or a deputy shall make the final and concluding argument. The privately retained counsel shall immediately inform the district attorney general of such counsel's employment.

Tenn. Code Ann. § 8-7-401(a).

Other pretrial evidence cited by the parties on Plaintiff's claims and the immunity issues are that Eldridge was charged on November 10, 1992. (Docket Entry No. 65, Gibson's Affidavit at p. 1). The private attorneys were not involved in the decision to charge the Plaintiff. *Id.* On February 13, 2001, the Putnam County Grand Jury indicted the Plaintiff. *Id.* at p. 2. Plaintiff denies that he assaulted the victim. (Docket Entry No. 86, Eldridge Affidavit). The Tennessee Court of Criminal Appeals ruled that its reversal was "unrelated to the merits." *Eldridge*, 951 S.W.2d 784. A civil jury rendered a $1.75 million verdict in the victim's favor, but that judgment was remanded on appeal. See *Fahey v. Eldridge*, 46 S.W.3d 138 (Tenn. 2001) (remanding appeal to the Tennessee Court of Appeals).

On November 20, 1992, Defendant Day's firm was retained by Robert Fahey, the victim to file a legal action for damages against the Plaintiff. (Docket Entry No. 69, Day Affidavit at pp 1-2). On October 22, 1993, the private attorney Defendants filed a civil action on

behalf of the victim against the Plaintiff and Eldridge Auto Sales, Inc. Michael Chambers and Linda Eldridge. *Id.*

On May 3, 1994 pursuant to a letter from Lillie Ann Sells, assistant district attorney. The private attorneys were appointed as special prosecutors. *Id.* at p. 2. In this letter, Sells wrote

> Re: State v. Fabian Eldridge & Mike Chambers/Linda Eldridge Putnam County Criminal Court nos. 93-75/93-185.
>
> Gentlemen:
>
> This will confirm your request and appointment as special prosecutors in the above case per T.C.A. § 8-7-401. This will also confirm the files of Fabian Eldridge and Mike Chambers and Linda Eldridge were given to Mike Knowlton on May 3, 1994.
>
> Enclosed is the *original* micro-cassette tape which Deputy Sam Lee made the night of the offense which was hand delivered to me by Deputy Lee on May 3, 1994. Also enclosed are the *original* and only copies of the photographs taken by Deputy Lee, and also enclosed is a copy of Deputy Lee's entire file given to me May 3, 1994. He will also deliver to you the knives he took from the scene for safekeeping and to allow defense discovery to be completed through your office rather than with him.
>
> *Enclosed is a copy of Ganger vs. Peyton, 379 F.2d 709, 713 (1967) which sets out some limitations for special prosecutors who are also handling a civil case arising out of the same offense.*

> *As stated previously, we decline any fu[r]ther involvement due to our busy schedules, other than the requirements of Ganger and T.C.A. § 8-7-401 (i.e., rebuttal summation, plea bargaining/settlement, and sentencing limitations).*
>
> If you have any questions, please do not hesitate to contact me.

(Docket Entry No. 78, Attachment hereto) (emphasis added).

Defendant Gibson admits that prior to Sells' letter, he decided to appoint the private attorney Defendants as special prosecutors. (Docket Entry No. 66, Gibson's Response to Plaintiff's Statement of Undisputed Facts at ¶ 41). Sells wrote the above letter, but Gibson did not read the letter before its mailing. *Id.* On May 10, 1994, the state trial court entered an Order on the appointment of those special prosecutors that reads as follows:

> Upon notification that the crime victim in the above styled cause has retained private counsel to assist in the prosecution of the above styled case per T.C.A. § 8-7-401, it is hereby
>
> ORDERED that private counsel David Day, Michael Knowlton and Robert Durham are appointment *special prosecutors* who will participate to the extent designated by the District Attorney pursuant to T.C.A. § 8-7-401.

(Docket Entry No. 36 at Attachment No.24) (emphasis added). The trial was set for May 17, 1994 and on May 19, 1994, the jury convicted Plaintiff of attempted second-degree murder. *Id.* at pp. 2-3.

There is a conclusory reference by Plaintiff's state criminal trial counsel that an unspecified special prosecutor discussed with him and he "understood" that a plea bargain was offered that included a monetary settlement in the civil action. (Docket Entry No. 36, Attachment No. 3 thereto). The factual bases for the trial counsel's understanding is not disclosed. William Cameron, Plaintiff's co-counsel in the state court criminal trial states that he spoke with Defendant Day and discussed "possible settlement" of the criminal charge and civil action to which Day replied a guilty plea to a lesser offense and $250,000 to $300,000 for the civil action. (Docket Entry No. 36, Attachment No. 5). Cameron had earlier represented Linda Eldridge who was dropped as a defendant in the criminal case, but remained a defendant in the civil action.

In an affidavit filed in a state criminal court, Day explained that his discussion of a settlement offer was in response to Cameron's request, and insists that he told Cameron the settlement of the criminal action was a matter for the District Attorney General to decide. (Docket Entry No. 42, Attachment thereto). Day never intimated to Cameron that he had any authority to settle the criminal case. *Id.* Day states that Plaintiff's lead counsel told him the cases could not settle and Day surmises that Cameron must have disclosed their conversation to Plaintiff's lead counsel. *Id.* Another defense counsel representing a co-defendant in Plaintiff's criminal action also discussed settlement with Day based upon Day's settlement talks with Cameron. *Id.* This defense counsel and Day did not discuss settlement of the co-defendant's case. *Id.* Defendant Gibson states that despite the appointment of the special prosecutor,

he retained the authority to settle the criminal charge against the Plaintiff. (Docket Entry No. 65, Gibson Affidavit at p. 3).

C. Conclusions of Law

Immunity defenses, sustained by the facts or the applicable law, are not only a defense against damages, but against further maintenance of the litigation.

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The *entitlement is an immunity from suit rather than a mere defense to liability*; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis added)

(citation omitted); *accord Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991); *Carlson v. Conklin*, 813 F.2d 769, 770 (6th Cir. 1987).

There is immunity from a § 1983 damages actions for various governmental officials depending upon the nature and scope of their duties and the state of the relevant law at the time of the § 1983 violation. The rationales for these immunity doctrines can differ depending upon the official and type of immunity. To obtain immunity, the government official must exercise discretionary duties. *Westfall v. Erwin*, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988)

> [W]hen an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct. It is only when officials exercise decisionmaking discretion that potential liability may shackle 'the fearless, vigorous, and effective administration of policies of government.'

484 U.S. at 296-97; *accord Davis v. Holly,* 835 F.2d 1175, 1178 (6th Cir. 1987); *see also infra* at pp. 181-82. Here, all of these Defendants exercised discretionary duties as state prosecutors.

In treating this immunity issue at the District Court level, the Supreme Court has emphasized that the desired procedural method is to resolve the immunity issues prior to the commencement of discovery.

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could

> he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. *Until this threshold immunity question is resolved, discovery should not be allowed.* If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396, 410-11 (1982) (emphasis added) (footnote omitted).

The issue of absolute immunity should be resolved before considering the merits of the action and the plaintiff bears the burden to establish its unavailability. *Wells v. Brown*, 891 F.2d 591, 592 (6th Cir. 1989); *see also Washington v. Newsom*, 977 F.2d 991, 995 (6th Cir. 1992). The Court is to use its full knowledge of its and other Courts' precedents. *Elder v. Holloway*, 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994).

The Court of Appeals for the Sixth Circuit observed that: "Because *Mitchell* contemplates that the defendant is to be also protected from the burdens of discovery until the resolution of [the qualified immunity] issue, *Mitchell* necessarily holds that the court is further obligated, upon application, not only to refrain from proceeding to trial but to stay discovery until that issue is decided." *Kennedy v. City of Cleveland,* 797 F.2d 297, 299 (6th Cir. 1986), *cert. denied,* 479 U.S. 1103 (987); *accord Jackson v. Lanzinger*,

977 F.2d 581, 1992 WL 276693 (6th Cir. 1992) (unpublished) (The District Court correctly dismissed the complaint as frivolous, finding that the defendants were entitled to judicial immunity).

Generally, resolution of an official's immunity is "purely a question of law for the district court." *Poe v. Hayden*, 853 F.2d 418, 424 (6th Cir. 1988). The Court possesses discretion, however, to determine if a material factual dispute is associated with the immunity issue so as to deny summary judgment. *Jackson v. Hoylman*, 933 F.2d 401 (6th Cir. 1991); *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987).

As the Supreme Court explained in *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991), in addressing the proper analytical framework for determining qualified immunity that extends with equal force for absolute immunity, in either instance, the first step is to decide if a federal right is presented.

> We have on several occasions addressed the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity asserted in a motion for summary judgment. Qualified immunity is a defense that must be pleaded by a defendant official. *Gomez v. Toledo,* 446 U.S. 635, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1080); *Harlow*, 457 U.S. at 815, 73 L.Ed.2d 396, 102 S.Ct. 2727. Once a defendant pleads a defense of qualified immunity, "[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . Until this threshold immunity question is resolved, discovery

should not be allowed." *Id.* at 818, 102 S.Ct. 2727, [73 L.Ed.2d 396].

* * *

In Harlow we said that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." *Harlow, supra*, at 818, 102 S.Ct. at 2738 (emphasis added). *A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits.* One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit. In *Mitchell v. Forsyth, supra*, we said:

> Harlow thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Id. at 231-32; *accord Hutsell v. Sayre*, 5 F.3d 996, 1003 (6th Cir. 1993); *Black v. Parke*, 4 F.2d 442, 445-46 (6th Cir. 1993); *Carlson v. Conklin*, 813 F.2d 769, 770-77 (6th Cir. 1987).

The defendant bears the burden of raising any immunity contention. *Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *Alexander v. Alexander*, 706 F.2d 751, 754 (6th Cir. 1983). In order to qualify for this immunity, the official "must plead facts which, if true, would establish that he was acting within the scope of his discretionary authority when the challenged conduct occurred." *Poe*, 853 F.2d at 424 n.3. Yet, the "'ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity.'" *Mackey v. Dyke*, 29 F.3d 1086, 1095 (6th Cir. 1994); *Washington v. Newsom*, 977 F.2d 991, 995 (6th Cir. 1992 (quoting *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991). For a response,

> While plaintiff need not anticipate the affirmative defense of qualified immunity in the complaint, if the defense arises in a motion, plaintiff's response must show sufficient facts to demonstrate that the defendants actions violated his rights and also that those rights were clearly established at the time of the infraction. *Dominique v. Telb*, 831 F.2d 673 (6th Cir. 1987). If plaintiff neither shows these facts in the complaint or in an answer to a motion, dismissal is proper. *Cameron v. Seitz*, 38 F.3d 264, 273 n.2 (6th Cir. 1994).

Veney v. Hogan, 70 F.3d 917, 921 (6th Cir. 1995).

Summary judgment is inappropriate, however, if there is a genuine factual dispute on an issue critical to

the immunity question, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. *Mackey v. Dyke*, 29 F.3d 1086, 1095 (6th Cir. 1994). The Sixth Circuit reaffirmed this holding in *Pray v. Sandusky*, 49 F.3d 1154 (6th Cir. 1995), when it held:

> We realize that qualified immunity is a question of law and should be resolved at the earliest possible moment. Nevertheless, summary judgment is not appropriate if there are factual disputes involving an issue on which the question of immunity turns, "such that i[t] cannot be determined before trial whether the defendants did acts that violated clearly established rights." *Poe*, 853 F.2d at 426. As stated by the panel of this court, many times "the jury becomes the final arbiter of [the defendants'] claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury." *Brandenburg v. Cureton*, 882 F.2d 211, 215-216 (6th Cir. 1989).

Id. at 1161; *accord Black v. Parke*, 4 F.3d 442, 450 (6th Cir. 1993) (whether inmate received process due under *Hewitt*). In any event, the Court must state clearly the basis for its ruling and why there are no material issues of fact or failure to do so will result in vacating its order with a remand to do so. *Crutcher v. Kentucky*, 883 F.2d 502, 503-04 (6th Cir. 1989); *see also Wegener v. Covington*, 933 F.2d 390 (6th Cir. 1991).

As to Plaintiff's Fourth Amendment claim, in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1984), involving a Fourth Amendment claim of an unreasonable search and seizure, the Supreme Court outlined the central question and held that the district

court's duty is to analyze claims of qualified immunity upon an objective basis.

> It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials. But contrary to the Creightons' assertion, this does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that Harlow sought to minimize. *The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant.*

483 U.S. at 641 (emphasis added).

As the Court of Appeals for this Circuit explained, the *Anderson* objective test renders former precedents establishing good faith as an element to consider "irrelevant."

> The district court found that "1) there existed reasonable grounds for Defendants to believe that their challenged action was appropriate, and (2) Defendants acted in good faith." The court noted that "[t]he test is based upon the objective reasonableness of the conduct as measured by reference to clearly established law."
>
> *That defendants "acted in good faith" is irrelevant.* The district court nonetheless applied an objective standard that is consistent with the rule enunciated in *Anderson v. Creighton*. There

> the court held that *the relevant question in determining whether an official is entitled to qualified immunity is whether a reasonable person in his position could have believed his conduct to be lawful in light of clearly established law and the information the official possessed. This is an objective inquiry, albeit a fact-specific one.*

Ecclesiastical Order of the Ism of Am. Inc. v. Chasin, 845 F.2d 113, 117 (6th Cir. 1988) (emphasis added) (citations omitted).

As to the Plaintiff's Fourth Amendment claim, the nature of this claim is not defined. Given the state court's finding that the officers on the scene observed Plaintiff stabbing the victim with a knife, there was probable cause to arrest the Plaintiff. The Court concludes that applying *Anderson*, there is not any Fourth Amendment violation.

As to Plaintiff's Fifth and Sixth Amendment claims, the Fifth Amendment claim is a *Brady* claim and concerns the lost or missing knife. On that issue, Plaintiff has not alleged or presented facts beyond the factual circumstances set forth by the Tennessee Court of Criminal Appeals. Although a *Brady* violation can be actionable under § 1983, there are not any factual allegations to show prejudice or bad faith to recover damages. The Tennessee Court of Criminal Appeals' rulings relief upon by the Plaintiff are to the contrary. In any event, a prosecutor cannot be held personally liable in a Section 1983 action for a *Brady* violation. *Jones v. Shankland*, 800 F.3d 78 (6th Cir. 1986) (The foregoing actions appear to us to be clearly within the scope of immunity contemplated by the Supreme Court in *Imbler*. The use of perjured testimony and the non-disclosure of exculpatory information are certainly entitled to absolute immunity. See *Imbler v*

Pachtman, 424 U.S. 409, 431 n. 34, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

As to this *Brady* claim against the Defendant Lee, the Tennessee Court of Criminal Appeals did not discern any *Brady* violation. The Plaintiff has not presented any other factual allegations beyond those discussed by the Tennessee Court of Criminal Appeals on the Defendant Lee's acts or omissions. Finally, the alleged loss of the weapons was the reason why the state trial court dismissed the case against the Plaintiff after the remand. (Docket Entry No. 41, Attachment No. 2 thereto).

The Plaintiff argues that the Tennessee Court of Criminal Appeals erred in its application of Tennessee law because Tennessee courts do not impose a bad faith requirement for the failure to preserve evidence. State law, however, does not control on the resolution of issues in a Section 1983 action. *Martinez v. California,* 444 U.S. 277, 284 n.8, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980).

The nature of the Sixth Amendment claim is not clearly defined and the Court considers that claim as without merit. Although a District Court must liberally construe civil rights complaints, litigants are required to adhere to basic pleading requirements. *Foster v. City of Cleveland Heights,* 81 F.3d 160, 1996 WL 132181 (6th Cir. 1996) (citations omitted). In *Codd v. Brown*, 949 F.2d 879, 882 (6th Cir. 1991), the Sixth Circuit stated that "[a] failure to identify a right, privilege or immunity secured by the Constitution that was violated merits dismissal of the cause of action for failure to state a claim upon which relief can be granted." The plaintiff also must allege what personal role each defendant played in the alleged violations of his rights and how each defendant's conduct

caused that violation. *Dunn v. Tennessee,* 697 F.2d 121, 128 (6th Cir. 1982), *cert. denied, Wyllie v. Dunn*, 460 U.S. 1086, 103 S.Ct. 1778, 76 L.Ed.2d 349 (1983); *accord Mosier v. Gillard*, No. 88-5311 (6th Cir. Oct. 17, 1988) (dismissal of complaint upheld for failure to plead specific facts where plaintiff did not identify who opened his mail or whether it was opened intentionally or inadvertently). The Court concludes that Plaintiff's Fifth and Sixth Amendment claims lack merit for failure to identify how this right was violated and by whom.

As to the state prosecutors who had a financial interest in the Plaintiff's criminal prosecution, as reflected by representation in a related and contemporaneous civil case, the Sixth Circuit has held such conduct to violate the Due Process Clause of the Fourteenth Amendment, albiet in a habeas proceeding. *Dick v. Scroggy*, 882 F.2d 192, 194-97 (6th Cir. 1989). Thus, the threshold for the immunity analysis on the existence of the Plaintiff's Fourteenth Amendment right to a fair trial is present.

The Defendants first assert quasi-judicial immunity upon the argument that the special state prosecutors were appointed by the state trial court's order. (Docket Entry No. 36, Attachment 24). Quasi-judicial immunity is available where a person acts pursuant to a Court's order and the person's acts are deemed essential to the judicial process. *Brisco v. LaHue*, 460 U.S. 325-235, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994) (" . . . enforcing or executing a court order is intrinsically associated with a judicial proceeding" giving rise to quasi-judicial immunity.). Inasmuch as the appointment of the private attorney Defendants as special prosecutors was committed solely to the discretion of the

District attorney by state statute, Tenn. Code. Ann. § 8-7-401, the Court concludes that the quasi-judicial immunity doctrine does not apply here because the state court did not exercise a 'neutral or detached' function that is at the heart of the judicial process, *United States v. Weaver*, 99 F.3d 1372, 1376 (6th Cir. 1996), but rather the Court's Order served to "rubber stamp" the District Attorney's decision. *Id.*

State prosecutors are absolutely immune from damages, but only for prosecutorial acts that were taken within the context of a criminal trial, or as a necessary part of the judicial process. *Imbler v. Pachtman*, 424 U.S. 409, 427-28, 96 S.Ct. 984, 47 L.Ed.2d 128, 141-42 (1976) (initiation of prosecution and presentation of the State's case). The Court utilized the same rationale and "functional approach" for prosecutors as for judges to decide the scope of this absolute immunity for prosecutors.

> The purpose of the Court of Appeals' focus upon the functional nature of the activities rather than respondent's status was to distinguish and leave standing those cases, in its Circuit and in some others, which hold that a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's. We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate.

> We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.

Id. at 430-31 (citations and footnotes omitted). The decision to prosecute, even a malicious decision to prosecute, enjoys absolute immunity. *Id.* at 421-24.

In a footnote, the Supreme Court observed in *Imbler* that the line may be difficult to draw, for some acts, where the prosecutor is an "administrator." *Id.* at 430 n.33. Later, in *Burns v. Reed,* 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), the Court held that a prosecutor's advice on whether to hypnotize a witness was not a protected activity, but the application for a search warrant and participation in a preliminary hearing was. In *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 2617, 125 L.Ed.2d 209 (1993), the Supreme Court held that a prosecutor's alleged false statements at a press conference and fabricating evidence are not within the prosecutorial role warranting absolute immunity and accordingly, the prosecutor is entitled only to qualified immunity for such claims. Yet, the Sixth Circuit in *Ireland v. Tunis*, 113 F.3d 1435, 1447 (6th Cir.) observed: "Absolute prosecutorial immunity will likewise attach to *administrative* or investigative acts necessary for a prosecutor to initiate *or maintain the criminal prosecution.*" (emphasis added).

As to whether these state prosecutors are entitled to immunity, resolution of that issue turns upon "the nature of the function performed, not the identity of the action who performed it." *Forrester*, 484 U.S. at 229. The prosecutors' functions at issue must be "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. As the Sixth Circuit stated: "[t]hose acts that

occur in the course of a prosecutors' role as an advocate for the state, e.g., acts taken to prepare for the initiation of judicial proceedings or to prepare for trial, are protected by absolute immunity." *Cooper v. Parrish,* 203 F.3d 937, 947 (6th Cir. 2000).

As to whether private attorneys who are appointed as special prosecutors for a particular case, as a general rule, private parties are not entitled to immunity in § 1983 actions. *Duncan v. Peck,* 844 F.2d 1261, 1264 (6th Cir. 1988). In *Richardson v. Knight,* 521 U.S. 399, 407 (1997), the Supreme Court held that a private corporation and its employee who maintained custody over state prisoners were not entitled to qualified immunity, but observed that "the [common] law *did* provide a kind of immunity for certain private defendants, *such as* doctors or *lawyers who performed services at the behest of the sovereign.*" (emphasis in the original and added in part with citations omitted). The Sixth Circuit applied this statement in *Richardson* to hold that a private attorney employed under a contract to provide legal services to a city in litigation was entitled to qualified immunity. *Cullinan v. Abramson,* 128 F.3d 301, 310 (6th Cir. 1997).

As to the attorney Defendants, clearly Gibson is a state prosecutor. Pursuant to Tenn. Code Ann. § 8-7-401, in this instance, Gibson could appoint special assistants and did so after an indictment had been returned by the state grand jury. It was Gibson's judgment, that the State needed the resources of the private attorneys to "maintain" Plaintiff's preexisting and pending state criminal prosecution against the Plaintiff. Although this appointment was not a judicial decision, this decision was approved by the state trial court whose order reflects the court's view that these private attorneys were serving as

"special prosecutors". (Docket Entry No. 36, Attachment thereto No. 24). These private attorneys' acts, as special prosecutors, were clearly made in the context of a pending criminal action. While most personnel decisions of prosecutors are not part of the prosecutorial function, the assignment of particular persons to serve as prosecutors to "maintain" a pending criminal case is an integral part of the prosecutorial function. Thus, under *Ireland*, the Court concludes that Gibson's appointment of the private attorneys was a prosecutorial function entitling Gibson to prosecutorial immunity that is absolute.

Although Gibson's decisions resulted in an unconstitutional conviction, the Sixth Circuit ruled in *Jones*, a § 1983 action based upon an invalid state conviction where the prosecutors were cited for several constitutional violations, including creating a conflict of interest that

> . . . [M]any of the claims charged against those in the prosecutor's office relate to their role as administrator or investigative officers, rather than as advocates. His complaint contains essentially allegations of failing to disclose exculpatory and other information concerning witnesses, procuring false testimony, failing to correct perjured testimony, causing a conflict of interest for defense counsel, not disclosing that conflict to Jones, putting a "spy" in the defense camp, and "covering up" those allegedly unconstitutional actions.
>
> * * *
>
> . . . The conflict of interest problems and the spy allegations would also seem to be related to the acts of an advocate and thus come within the area of prosecutorial immunity as do the cover

> up allegations which merely appear to be restatements of the prosecution's claimed failure to disclose exculpatory information.

800 F.2d at 80.

Earlier in *Hillard v. Williams,* 540 F.2d 220, 221-22 (6th Cir. 1976) (*per curiam*), the Sixth Circuit stated

> ". . . [T]his court strongly condemns the actions of District Attorney General . . . Whether guilty or innocent, Mrs. Hillard had a due process right to a fair trial . . . We believe that by these acts and omissions defendant [District Attorney General] deprived [the defendant] of her constitutional right to a fair trial. Nevertheless, we conclude that under the decision in *Imbler*, [the] prosecuting attorney is not liable in damages to appellant Hillard in this action filed under 42 U.S.C. [Section] 1983."

Id. at 221-22 (quoting *Hillard v. Williams*, 516 F.2d 1344, 1329 (6th Cir. 1975)).

Plaintiff argues that Section 8-7-401 does not authorize the delegation of control of the litigation to these private attorneys as special assistants, but the statute only requires the District Attorney of his assistant to make "the final and concluding argument." The facts are that at trial, the state assistant district attorney general did so. *Eldridge*, 951 S.W2d at 780.

The Plaintiff also argues that state law does not confer immunity on attorneys appointed pursuant to Tenn. Code Ann. S 8-7-401, but does confer prosecutorial immunity for prosecutors under Tenn. Code Ann. § 8-7-106 (defining the role of a district attorney general *pro tem*). from the Court's review of Section 8-7-106, that statute

does not grant or refer to any immunity, only privileges of office. In any event, under *Martinez,* state law and state legislative intent do not control on the federal question of whether these attorneys were serving a prosecutorial function for the purposes of Section 1983 immunity.

As to any claim against Gibson in his official capacity, a judicial district is created by state statute. Tenn. Code Ann. §§ 8-7-401 *et seq.* and 16-2-506(13(A). See also Tenn. Const. Act. VI § 5 (allowing courts to appoint the "Attorney for any district" in certain circumstances"). A District Attorney General is a state official who represents the State at criminal trials. *Id.* Thus, this Court concludes that Gibson's district is a state agency and damages claims against a state agency, as here, are barred by the Eleventh Amendment. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

As to the private attorney Defendants, these Defendants were appointed after the grand jury indicted the Plaintiff. These Defendants did not decide whether criminal charges against the Plaintiff should be pursued. These attorneys were duly appointed pursuant to a state statute that permits the appointment of special prosecutors. Tenn. Code Ann. § 8-7-401. The state trial court viewed those defendants as "special prosecutors". (Docket Entry No. 36, Attachment 24). These private attorneys acted as prosecutors in representing the state in a criminal case, arguing pretrial matters and presenting witnesses. These are the inherent functions of a prosecutor and these functions were in the context of a state criminal trial. Thus, applying the function analysis, the Court concludes that the private Defendants were state prosecutors and are also entitled to absolute immunity for their work on Plaintiff's criminal trial.

To be sure, in *Cooper*, the Sixth Circuit found a private attorney acting in concert with local prosecutors in a civil nuisance action was not entitled to absolute immunity as a prosecutor. Yet, *Cooper* is distinguishable in that the private attorney there "was never properly appointed to serve as an assistant district attorney." 203 F.3d at 950. There was not any "statutory authority to formally appoint" the private attorney. *Id.* at 950-51. The private attorney in *Cooper* was not appointed pursuant to the applicable state statute and was paid with private funds. *Id.* at 950-51. The Court notes, that the District Attorney General who appointed the private attorney was held to be absolutely immune. *Id.* at 948.

The Plaintiff also relies upon *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987) that did not involve a criminal case or constitutional issue, but rather a federal District court's authority to appoint a private party's counsel to prosecute a criminal contempt issue arising out of the same civil case. The absence of a constitutional bases for the court's holding in *Young* is reflected in the concuring opinion of Justice Blackmun who stated ". . . I would go further, however, and hold that the practice – federal or state – of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process." 481 U.S. 814-15. Moreover, a district court in the Sixth Circuit observed, the *Young* decision was a plurality decision, not a majority decision. *United States v. Hart*, 779 F.Supp. 883, 891 (E.D.Mich. 1991). Further, the Tennessee Court of Criminal Appeals, likewise relied upon *Young* and noted that *Young* did not clearly establish the constitutional right asserted here, but rather "*probably* only foreshadows a constitutional bar with respect to the use of interested

private prosecutors." 951 S.W.2d at 782 (emphasis added). The Court notes that the Tennessee Supreme Court has recently upheld the appointment of a husband's private counsel to prosecute a contempt action against his wife in the same divorce proceeding. See *Wilson v. Wilson*, 984 S.W.2d 898, 903-04 (Tenn. 1998).

Plaintiff also relies upon a Fourth Circuit decision, *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967), that involved a state's attorney prosecuting the Defendant, the husband of the wife the state's attorney also represented in a divorce proceeding. 379 F.2d at 711. The divorce proceeding also involved the assault at issue in the criminal proceeding. *Id.* The State's attorney made an offer to the Defendant to drop the assault charge if the Defendant agreed to property settlement favorable to his wife in the divorce proceeding. The court ruled that the prosecutory represented the public interest *id.* at 714 and has the duty to act in the public interest *id.* and this simultaneous representation compromised the prosecutor's decision to decline to prosecute, to reduce the charge or to recommend a suspended sentence. *Id.* at 713. The Court then concluded that the prosecutor deprived the Defendant's trial of the "fundamental fairness assessed by the Due Process Clause of the Fourteenth Amendment." *Id.* at 714.

As to the effect of *Ganger* on the immunity issues here, the Sixth Circuit's rule on immunity issues in Section 1983 actions is that "[a] . . . single opinion from the Court of Appeals from another Circuit was hardly sufficient to put the Defendants on notices of this Circuit for the Supreme Court might come out on the issue in question. *Ohio Civil Services Employees Assn. v. Seiter,* 858 F.2d 1171, 1176 (6th Cir. 1988) (citation omitted). The Court also noted "[o]ur court has also found the opinions of

other Circuits to be insufficient to clearly establish a constitutional right. . ." *Id.* at 1176, n.2. Second, the *Scroggy* decision would control here on the issue of whether these facts establish a due process violation. Yet, in a Section 1983 context, the *Jones* holding is that any damages claims against the state prosecutors, including the special prosecutors, for denial of a fair trial are barred by absolute immunity doctrine and *Jones* controls here.

The Plaintiff also cites several state court decisions, but state law is not controlling in a Section 1983 action. *Martinez,* 444 U.S. at 284, n.8. Moreover, state court decisions cannot be used to determine whether a right is clearly established as to immunity issues in a Section 1983 action. *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995).

In sum, the Court concludes that despite facts to show a due process violation with the appointment of these private attorneys, under the governing law, the Defendants Gibson, Day, Knowlton and Durham are entitled to absolute immunity and Plaintiff's damages claims against them should be dismissed. For these reasons, the Court deems it unnecessary to address the Defendant Gibson's contentions that the claims against him are time barred.

As to the Defendant Lee, Plaintiff filed a notice of nonsuit without prejudice to which Lee objects unless the dismissal is with prejudice, citing Judge Morton's and the Tennessee Court of Criminal Appeals' rulings. (Docket Entry No. 54).

Under Fed.R.Civ.P. 41(a)(1), a dismissal of an action can be based upon "such terms and conditions as the court deems proper." See *DWG Corp. v. Granda Investments, Inc.,* 962 F.2d 1201, 1202 (6th Cir. 1992).

> While the basic purpose of Rule 41(a)(2) is to allow a plaintiff to dismiss an action without prejudice to future litigation, the dismissal must not unfairly jeopardize the defendant's interests. Accordingly, dismissal should in most instances be granted, unless the result would be to legally harm the defendant.

5 Moore's Federal Practice ¶ 111.05 at pp. 41-56 (1993) (footnotes omitted).

Given Judge Morton's Order to show cause as to why the claim against the Defendant Lee should not be dismissed, the passage of time since the filing of this action and that Order, and the Tennessee Court of Criminal Appeals' rulings about his conduct, this Court concludes that without any additional factual allegations against Lee, the dismissal of Plaintiff's claims against Lee should be dismissed with prejudice.

An appropriate Order is filed herewith.

Entered this the 3rd day of August, 2001.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
United States District Judge

IN THE CRIMINAL COURT FOR
PUTNAM COUNTY, TENNESSEE AT COOKEVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	Case No. 93-75
	)	
FABIEN ELDRIDGE	)	

ORDER

(Filed Sept. 6, 2000)

This cause came to be heard on the defendant's motion to dismiss before the Honorable Charles D. Haston, sitting by special assignment by the Tennessee Supreme Court, on October 8, 1999, and continued for further hearings on March 22, April 12, and August 25, 2000. Assistant District Attorney Generals Ed Bailey, Jr. and Kirk Andrews with the District Attorney General's office for the 5th Judicial District, appointed as special prosecutors in the matter, appeared on behalf of the State, and Rick Halprin and Chantal M. Eldridge appeared on behalf of the defense. Based upon evidence presented at the hearings, the entire record as a whole, the arguments of counsel, and for good cause shown,

IT IS HEREBY ORDERED that the defendant's motion to dismiss IS GRANTED. The Court specifically finds that pursuant to the Sixth Amendment of the United States Constitution made applicable to the State through the Fourteenth Amendment and Article 1, section 9 of the Tennessee Constitution and T.C.A. section 40-14-101, the defendant is entitled to a speedy trial, and that in applying the balancing test enunicated in *Barker v. Wingo*, 407 U.S. 514 (1972) and adopted by the Tennessee Supreme Court in

State v. Bishop, 493 S.W.2d 81, 84 (Tenn. 1973), the defendant's right to a speedy trial would be violated by his continued prosecution. While the Court acknowledges that no one factor is dispositive, the Court finds that the length of delay in the defendant's prosecution is presumptively prejudicial, the defendant had asserted his right to a speedy trial in August, 1997, and the defense was irreparably prejudiced by, among other things, the loss of material evidence. The Court finds that the reasons for the delay by this Court and Generals Bailey and Andrews for the 5th Judicial District were due to administrative factors, including an overburdened court calendar, and that the prejudice to the defense had accrued *before* the appointment of this Court or the special administrators in the case.

Based on the Court's consideration of the foregoing factors, it is of the opinion that the defendant would be unable to receive a fair trial at this time. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the above-entitled action IS DISMISSED WITH PREJUDICE.

ENTERED this ___ day of August, 2000.

/s/ Charles D. Haston
CHARLES D. HASTON,
CIRCUIT JUDGE

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STATE v. ELDRIDGE, 951 S.W.2d 775 (Tenn.Cr.App. 1997)

STATE of Tennessee, Appellee, v. Fabien ELDRIDGE, Appellant.

Court of Criminal Appeals of Tennessee, at Nashville.

May 7, 1997.

No Permission to Appeal Applied for to the Spreme Court.

Appeals from the Circuit Court, Putnam County, Leon Burns, Jr., J.

Reversed and remanded.

Welles, J., filed concurring opinion.

Frank Buck, Smithville, Alan M. Dershowitz, Cambridge, MA, for Appellant.

Charles W. Burson, Attorney General and Reporter, Kathy Morante, Assistant Attorney General, Nashville, William Edward Gibson, District Attorney General, Ben Fann, Assistant District Attorney General, Cookeville, for Appellee.

OPINION

RILEY, Judge.

This is a direct appeal from a jury verdict of guilty of attempted second degree murder. The defendant was sentenced as a standard offender to nine and one-half (9 1/2) years in the Tennessee Department of Correction and fined in the amount of $25,000. Defendant presents the following issues for our review:

1. whether the state's failure to preserve a knife and failure to notify the defense of its disappearance violated defendant's constitutional rights;

2. whether the trial court's jury instruction on attempted second degree murder was erroneous due to the failure to include specific intent to kill as a required element of the offense; and

3. whether the participation as special prosecutors of attorneys who also represented the victim in a pending civil lawsuit arising from this incident violated defendant's due process rights.

We find the prosecutorial participation of attorneys who also represented the victim in a pending civil lawsuit arising from the same incident violated defendant's due process rights and was prejudicial to the judicial process; therefore, we reverse and remand for a new trial.

I. EVIDENCE AT TRIAL

Although the defendant does not contest the sufficiency of the evidence, a cursory examination of the state's proof is appropriate.

The state's proof showed that the defendant was angry with the victim over something that had happened to the defendant's sister. The defendant entered the victim's residence with what appeared to be a knife. Upon being summoned to the scene, the officers discovered the defendant beating the victim. The victim was covered with blood and had lacerations on his face. A knife was found on the couch.

The defendant was convicted of attempted second degree murder.

II. THE MISSING KNIFE

The defendant claims that his rights under the Constitutions of the United States and the State of Tennessee were violated by the state's loss of an allegedly blood-covered knife. He specifically argues that the state violated the standards for disclosing exculpatory evidence set forth in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Alternatively, he alleges that the state acted in bad faith in its handling of the knife in violation of *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

When the defendant was arrested, Deputy Sam Lee allegedly recovered four knives from the home of the victim. Deputy Lee apparently never sent the knives to be tested for blood and fingerprints. When the defense viewed the physical evidence prior to trial, one of the knives was missing.

A. *BRADY V. MARYLAND*

The defendant argues that the state did not disclose that the fourth knife recovered from the home of the victim was blood-covered and had been misplaced. He contends that Deputy Lee knew of the possibly exculpatory nature of the knife by placing it in a separate bag from the other knives. He claims the blood on the knife could be that of the co-defendant who intervened to protect the defendant from the victim, thereby supporting the defense that the victim was the first aggressor. Thus, he urges that "[t]hese facts were plainly 'favorable' to the defendant and would have been 'material' to his defense."

In *Brady v. Maryland,* the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196-1197; *see also Hartman v. State,* 896 S.W.2d 94 (Tenn. 1995). However, the state is not required to disclose information that the defendant already possesses. *State v. Marshall,* 845 S.W.2d 228 (Tenn. Crim. App. 1992).

The defendant knew as early as the preliminary hearing that four knives actually existed and that one or two of the knives had blood on them. Defense counsel asked Deputy Lee about the knives at the preliminary hearing as follows:

Q. "Did you find four kitchen-type knives at the scene with blood on them?"

A: "I found one I know for sure, I think possibly two, kitchen knives in the living room area with blood on them."

. . . .

Q: "Did you take into your possession four – a total of four kitchen knives?"

A: "Yes, I did."

Q: "One of which was blood covered and the other one you think had blood on it?"

A: "Yes."

Similarly, the defense was also aware at trial that one of the knives was missing. The defense investigator viewed

the physical evidence the day before trial. Although he knew that four knives had been seized by the Sheriff's Department, only three knives were produced. All of the knives were dirty, but only one had what appeared to be blood, food, or rust on it.

We conclude that *Brady* was not violated in this case. The defense was aware that four knives were seized from the scene and that there was blood on at least one of the knives. Further, the defense knew at trial that one of the knives was missing from the physical evidence. The state did not suppress any of this information. The defense made no objections during trial, nor did they ask that any of the knives be tested. Therefore, we find no merit to this issue.

B. *ARIZONA V. YOUNGBLOOD*

In the alternative, the defendant argues that the state exhibited bad faith in its failure to preserve the fourth knife as potentially useful evidence. Therefore, he claims that the state infringed on his right to due process of law under *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

In *Arizona v. Youngblood,* the Supreme Court majority held that failure to preserve potentially useful evidence can be a denial of due process if the defendant can show bad faith on the part of the police. The Court noted that the presence of bad faith necessarily turns on the police's knowledge of the exculpatory nature of the evidence at the time it is lost or misplaced. *Id.* at 56, 109 S.Ct. at 336.

In this case, we are confronted with many differing stories as to the nature of the missing knife. It is unclear

from the preliminary hearing, the testimony at trial, and the post-trial testimony and affidavits whether or not there was blood on the knife. Deputy Lee stated at the preliminary hearing that maybe two knives were covered in blood. However, at the hearing on the motion for new trial, Deputy Lee claimed that only one knife had blood on it, and he kept it separate from the others. Furthermore, the day before trial, the defense saw only three knives, one of which possibly had blood on it. Consequently, we are left to speculate as to the exculpatory nature of this missing knife.

In any event, the defendant has not demonstrated that the police acted in bad faith in its misplacement of the knife. The mere fact that it is missing is not an indicia of bad faith. Deputy Lee was not aware of any exculpatory value of the knife at the onset. Any error on the part of the state was merely negligence. Accordingly, we find no violation of *Arizona v. Youngblood.*

III. JURY CHARGE ON ATTEMPTED SECOND DEGREE MURDER

Defendant contends the jury charge on attempted second degree murder was deficient by failing to include the specific intent to kill as an element of the offense.

The jury charge as to attempted second degree murder required the state to prove beyond a reasonable doubt the following:

> "(1) that the defendant acted knowingly to commit the offense of second degree murder; and
>
> (2) that the defendant acted with intent to complete a course of action or cause a result that

> would constitute second degree murder under the circumstances surrounding the conduct as the person believed them to be and the conduct constituted a substantial step toward the commission of second degree murder.
>
> Conduct does not constitute a substantial step unless the defendant's entire course of action is corroborative of the intent to commit the offense.
>
> Before you find the defendant guilty of attempted second degree murder, you must be satisfied beyond a reasonable doubt that the attempt was of such a character and made under such circumstances that had death resulted, the defendants would have been guilty of second degree murder."

The jury charge then defined the elements of second degree murder as follows:

> (1) that the defendant unlawfully killed the alleged victim; and
>
> (2) that the killing was knowing.
>
> . . . .

The requirement of "knowing" is also established if it is shown that the defendant acted intentionally.

> "Intentional" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.
>
> "Knowing" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct and that the circumstances exist. A person acts knowingly

> with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.

The jury charge used by the trial court was identical to the pattern jury charge on criminal attempt. T.P.I. – Crim. 4.01 (3rd ed. 1992). This pattern charge does not expressly state that a defendant must intend to commit the specific offense of second degree murder. The new edition, T.P.I. – Crim. 4.01 (4th ed. 1995), expressly includes the defendant's intent to commit the specific offense as an essential element. Unfortunately, this pattern charge had not been published at the time of trial.

Furthermore, *State v. Kimbrough,* 924 S.W.2d 888 (Tenn. 1996) had not been decided at the time of trial. *Kimbrough* definitively holds that an attempt to commit murder requires a specific intent to kill. *Id.* at 891.

The alleged omission from the jury charge was not brought to the attention of the trial judge. Nevertheless, the failure to make such an objection does not bar the defendant from using it as a basis of the motion for new trial. T.R.Cr.P. 30(b). Although counsel must raise a contemporaneous objection to an incomplete jury charge, *see State v. Haynes,* 720 S.W.2d 76 (Tenn. Crim. App. 1986), there is no requirement for an objection to the inclusion of an erroneous instruction or otherwise inaccurate charge. *State v. Stafford,* 670 S.W.2d 243 (Tenn. Crim. App. 1984).

Certainly, the language in the new pattern charge requiring as an element of the offense "that the defendant intended to commit the specific offense of [second degree murder]" is preferable. However, the jury charge in the instant case implicitly required a finding of the intent to

commit second degree murder. The charge required the jury to find that "the defendant *acted with intent* to complete a course of action or cause a result that would constitute second degree murder . . . " (emphasis added). The charge further required a finding that the defendant's "conduct constitute a substantial step toward the commission of second degree murder" with the defendant's entire course of action "corroborative of the *intent* to commit the offense." (emphasis added). This can only be interpreted to require an intent to commit second degree murder.

In determining that criminal attempt requires a specific intent, *Kimbrough* emphasized the language "intent to complete a course of action or cause a result" in our criminal attempt statute. *Supra* at 889-890; T.C.A. § 39-12-101(a)(3). We conclude this language in the statute, which was expressly charged to the jury, sufficiently encompasses the specific intent required for criminal attempt.

This issue is without merit.

SPECIAL PROSECUTORS

Defendant next asserts that the participation as special prosecutors of the victim's attorneys who were actively litigating a related pending civil lawsuit violated his rights to due process of law. We agree.

A. Involvement of the Special Prosecutors

Approximately seven (7) months prior to the criminal trial, the victim's private attorneys filed a civil lawsuit against the defendant seeking $1,000,000 in compensatory damages and $2,000,000 in punitive damages for injuries

arising from the same incident prosecuted in the criminal case. Approximately two (2) weeks prior to trial the district attorney general by letter to the special prosecutors (1) confirmed the participation of the special prosecutors; (2) advised that various items of evidence would be delivered to the special prosecutors; (3) stated that defense discovery would be completed through the office of the special prosecutors; (4) enclosed a copy of *Ganger v. Peyton,* 379 F.2d 709 (4th Cir. 1967), "setting forth some limitations for special prosecutors who are handling a civil case arising out of the same offense;"[1] and (5) "decline[d] any further involvement due to our busy schedules, other than the requirements of *Ganger* and T.C.A. § 8-7-401."

Prior to trial the special prosecutors served several motions on defense counsel. At trial the special prosecutors conducted the voir dire, argued all pre-trial motions, gave the opening statement, handled motions and objections, examined every witness for the prosecution and defense, and delivered the primary closing argument. The only active involvement by the assistant district attorney general was making the rebuttal argument required by T.C.A. § 8-7-401 at which time the assistant district attorney stated to the jury:

> " . . . I've been here watching two young prosecutors, special prosecutors, and three young defense attorneys, but the law says I have to come

[1] Our reading of *Ganger* does not reveal a listing of limitations for special prosecutors who are handling a civil case arising out of the same offense. *Ganger* unequivocally condemns such a practice as violative of due process. *Ganger* at 714.

> up here and give the last argument because I'm an Assistant District Attorney."

At no time prior to trial or during trial did defense counsel raise any objection to the participation by the special prosecutors. It was not until the defendant retained other counsel to represent him on the motion for new trial that the issue was first raised in the trial court. In denying the motion for new trial, the trial judge found that the special prosecutor issue had been waived by the failure to object. Based upon the "affidavits and oral testimony of the District Attorney and the Special Prosecutors given in response to this motion," the trial judge found that the district attorney maintained appropriate control of the prosecution of the case.

B. Other Jurisdictions and Tennessee

Being aware of the special dangers inherent in private prosecutions, some states prohibit the practice altogether. *See* Patricia Moran, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure, 54 Fordham L.Rev. 1141, 1152 (1986)* [hereinafter Moran, *Private Prosecutors*].

The majority of jurisdictions that allow the use of private prosecutors, by statute or case law, require the public prosecutor's consent and retention of control over the case. *See* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors,* 47 Ark.L.Rev. 511, 529 (1994) [hereinafter Bessler, *The Public Interest*] (citing numerous cases from other jurisdictions). Another restriction that is placed upon the use of private prosecutors in most states is the prohibition of their participation in related civil matters. *Id.* at 529-530; Moran, *Private*

Prosecutors at 1154, n. 54 (citing *Peterson v. Peterson,* 278 Minn. 275, 281, 153 N.W.2d 825, 830 (1967)); *Born v. State,* 397 P.2d 924, 927 (Okl.Crim.App. 1964), *cert. denied,* 379 U.S. 1000, 85 S.Ct. 718, 13 L.Ed.2d 701 (1965); *Commonwealth v. Musto,* 348 Pa. 300, 303-304, 35 A.2d 307, 310 (1944); *State v. Basham,* 84 S.D. 250, 256, 170 N.W.2d 238, 241 (1969); *Cantrell v. Commonwealth,* 229 Va. 387, 393-394, 329 S.E.2d 22, 26-27 (1985); *State ex rel. Koppers Co. v. International Union of Oil, Chem. & Atomic Workers,* 171 W. Va. 290, 298 S.E.2d 827, 831 (W. Va. 1982); *People v. White,* 365 Ill. 499, 511, 6 N.E.2d 1015, 1021 (1937). We are aware of only one twentieth century case holding unequivocally that a private prosecutor who also represents plaintiffs in a civil action arising out of the same proceeding presents no inherent due process or ethical problems. Moran, *Private Prosecutors* at n. 57 (citing *Hopkins v. State,* 429 So.2d 1146, 1154 (Ala. Crim. App. 1983)).

There is statutory authority in Tennessee for the participation of special prosecutors retained by victims of crime. T.C.A. § 8-7-401 (1993) provides as follows:

> A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or the district attorney general's deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general. The district attorney general or a deputy shall make the final and concluding argument. The privately retained

> counsel shall immediately inform the district attorney of such counsel's employment.[2]

There is no requirement that a district attorney general show cause for the participation of a special prosecutor in a criminal action. *State v. Voltz,* 626 S.W.2d 291 (Tenn. Crim. App. 1981).

C. Conflict of Interest/Ethical Dilemmas

There are certain inherent conflicts that arise due to the differing roles of the government prosecutor and private prosecutor. The responsibility of a public prosecutor differs from that of the usual advocate in that it is the public prosecutor's duty to seek justice, not merely to convict. *Code of Professional Responsibility,* Tenn.S.Ct. Rule 8, EC 7-13. Unlike a private prosecutor, the public prosecutor is not only an advocate but also must make decisions normally made by an individual client, and those affecting the public interest should be fair to all. *Id.* A public prosecutor represents the government. A public prosecutor is required to make timely disclosure of exculpatory materials. DR 7-103(B).

On the other hand, private counsel has an obligation to zealously represent the client so as not to prejudice or damage the client during the course of the professional relationship. DR 7-101. Counsel has a duty of fidelity,

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[2] The 1995 amendment to T.C.A. § 8-7-401 authorizes a defendant to object to the employment of special prosecutors and directs the court to make a specific finding as to whether they have a conflict of interest as provided by law. T.C.A. § 8-7-401(b) (Supp. 1996). The amendment was not in effect at the time of this trial.

unquestioned, continuing fidelity to the client. *Brotherhood of Locomotive Firemen & Enginemen v. United States,* 411 F.2d 312, 319 (5th Cir. 1969). A special prosecutor is placed in the awkward position of representing both the government and the individual victim or family of the victim.

The dual role of a special prosecutor presents other ethical dilemmas; namely, DR 5-105 provides that a lawyer should refuse to accept or continue employment if the interest of another client may impair the exercise of independent judgment; EC 5-1 provides that the professional judgment of a lawyer should be exercised solely for the benefit of the client, free of "compromising influences and loyalties;" EC 5-2 provides that a lawyer should not accept employment if there is a reasonable probability that personal interest will "affect adversely the advice to be given or services rendered the prospective client;" and EC 5-14 provides that independent professional judgment is compromised when a lawyer is asked to represent two (2) or more clients with differing interests. In the event a special prosecutor represents the victim in a civil case arising from the alleged criminal incident, DR 7-105 would prohibit participating in presenting or threatening to present criminal charges solely to obtain an advantage in a civil matter. Just as a special prosecutor may be tempted to bring a tenuously supported prosecution if such a reward promises financial or legal rewards for the private client, a special prosecutor may also be tempted to suggest the abandonment of a meritorious prosecution if a settlement providing benefits to the private client is conditioned on a recommendation against criminal charges. *Young v. United States ex rel. Vuitton,* 481 U.S. 787, 805, 107 S.Ct. 2124, 2136-2137, 95 L.Ed.2d 740 (1987).

D. *Young*

The most compelling analysis of the inherent conflicts experienced by special prosecutors is set forth in *Young v. United States, ex rel. Vuitton,* 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). Acting through its supervisory authority, the Court cited numerous statutory and ethical duties giving rise to conflicts of interest and held that the appointment of an interested special prosecutor in a criminal contempt proceeding is so fundamental and pervasive that the conviction requires reversal without regard to the facts and circumstances of the particular case. *Id.* at 809-810, 107 S.Ct. at 2138-2139.

E. Due Process Violation

Although *Young* strongly condemned interested counsel serving as special prosecutors, the Court avoided the necessity of reaching the constitutional issue since it relied upon its inherent supervisory authority in condemning the practice. *Young,* 481 U.S. at 809, 107 S.Ct. at 2138-2139. Obviously, this does not preclude and probably only foreshadows a constitutional bar with respect to the use of interested private prosecutors. Bessler, *The Public Interest* at 571. In fact, the United States Supreme Court had earlier considered the due process implications of prosecutorial functions. In *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980), the court found no due process violation since no prosecutorial officials stood to benefit financially, and there was no realistic possibility that prosecutorial decisions would be "distorted" by improper influences. *Id.* at 250, 100 S.Ct. at 1617. However, the Court left open the possibility of due process violations where enforcement decisions are motivated by personal

interest, financial or otherwise. *Id.* at 249-250, 100 S.Ct. at 1616-1617.

Numerous cases have either found express due process violations or due process implications relating to the participation of an interested prosecutor. Moran, *Private Prosecutors* at 1157 (citing *Ganger v. Peyton,* 379 F.2d 709, 714 (4th Cir. 1967)); *Brotherhood of Locomotive Firemen v. United States,* 411 F.2d 312, 319 (5th Cir. 1969); *Davenport v. State,* 157 Ga. App. 704, 705-706, 278 S.E.2d 440, 441; *State ex rel. Koppers Co. v. International Union Oil, Chem. & Atomic Workers,* 171 W. Va. 290, 298 S.E.2d 827, 832 (W. Va. 1982); *Polo Fashions, Inc. v. Stock Buyers Int'l. Inc.,* 760 F.2d 698, 704 (6th Cir. 1985); *People v. Zimmer,* 51 N.Y.2d 390, 395, 414 N.E.2d 705, 708, 434 N.Y.S.2d 206, 209 (1980); *People v. Superior Ct.,* 19 Cal.3d 255, 268-69, 561 P.2d 1164, 1173, 137 Cal.Rptr. 476, 485 (1977); *Cantrell v. Commonwealth,* 229 Va. 387, 394, 329 S.E.2d 22, 26-27 (1985). *See also Wright v. United States,* 732 F.2d 1048 (2d Cir. 1984).

We have no hesitation in concluding that the participation by special prosecutors who represent the victim in a civil matter arising from the same incident giving rise to the criminal prosecution is a violation of the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Law of the Land provision in Article I, § 8 of the Tennessee Constitution.

F. *Bennett*

The controlling Tennessee case relating to special prosecutors is *State v. Bennett,* 798 S.W.2d 783 (Tenn. Crim. App. 1990). *Bennett* held that T.C.A. § 8-7-401, the

statute authorizing the employment of special prosecutors, does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or the Law of the Land Clause contained in Article I, § 8 of the Tennessee Constitution. Notwithstanding the facial constitutionality of the statute, the Court examined the actions of the special prosecutors in determining whether their actions resulted in a deprivation of a constitutional right. In finding no constitutional violation, the Court found as follows:

> (1) the special prosecutors did not engage in prosecutorial misconduct;
>
> (2) *the special prosecutors did not represent the family of the victim in a civil case arising out of the occurrence which gave rise to criminal prosecution* (emphasis added);
>
> (3) this was not a contempt proceeding which arose out of a civil prosecution; and
>
> (4) the district attorney general maintained control over the prosecution as required by our statute.

Although *Bennett* upheld the constitutionality of the statute, the actions of the special prosecutors must be examined in order to determine whether the application of the statute in a particular case results in constitutional deprivation.

G. Due Process Application to Instant Case

An analysis of the activities of the special prosecutors in the instant case clearly reveals a due process violation. It is undisputed that the special prosecutors represented

the victim in a civil case arising from the incident giving rise to the criminal prosecution. This distinguishes the case from *State v. Bennett,* 798 S.W.2d at 786. As zealous advocates representing the victim in the civil case, counsel would best serve the victim by securing a criminal conviction. Evidence of the final judgment of conviction would be admissible in the civil trial to prove the facts essential to sustain the judgment. *Tennessee Rules of Evidence* § 803(22). In addition the victim's position in the civil litigation relating to the request for punitive damages would be more readily provable with a criminal conviction.

The special prosecutors endeavored to take an audio/visual deposition of defendant in the civil case just prior to the criminal trial. This, of course, is not allowable in the criminal prosecution. It resulted in an order from the civil tribunal authorizing the taking of the depositions; provided, however, the state would not be permitted to use at the criminal trial any portion of the depositions involving Fifth Amendment assertions.

There was a factual dispute as to whether the special prosecutors had offered to settle both the civil and criminal proceedings for a sum certain; however, this factual dispute was not resolved by the trial court. Nevertheless, the affidavit of one of the special prosecutors indicates that he discussed the possibility of settlement with the victim and was advised that the victim would settle for $250,000 to $300,000, "but he wanted Mr. Eldridge to do some time in jail." The affidavit reveals that the special prosecutor then advised defense counsel of the settlement offer of $250,000 to $300,000 for the civil case, "and that we would have no objection to Mr. Eldridge pleading to a lesser included felony offense, possibly aggravated assault, but that settlement of the criminal matter would be left up

to the district attorney's office." Therefore, it is apparent that payment of this sum of money by the defendant would result in a favorable recommendation of the special prosecutors in the criminal matter.

Also of significance are the pecuniary advantages that could benefit the special prosecutors. *See* Moran, *Private Prosecutors* at 1158. Although it is unclear from the record how the special prosecutors were to be compensated in either the civil or criminal case, the special prosecutors certainly had a direct interest in the outcome of the criminal proceeding.[3]

The inherent conflicts of interest of the special prosecutors are indeed obvious and irreconcilable. Furthermore, although it is unnecessary to reach the issue as to whether the district attorney general retained adequate control of the prosecution, it is at least apparent that the special prosecutors had virtually total control of the trial proceeding. The only participation by the assistant district attorney general was in making the rebuttal argument which he acknowledged to the jury he was doing since "the law says I have to come up here and give the last argument because I'm an Assistant District Attorney." It would appear the public prosecutor followed his commitment set forth in his letter to the special prosecutor declining "further involvement due to our busy

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[3] In the event the special prosecutors had the civil case on a contingency fee basis, then they would have a direct financial interest in the criminal proceeding leading to an irreconcilable conflict. The trial court made no finding regarding this issue; therefore, neither do we. Regardless of the method of compensation, counsel derives advantages from a conviction. Moran, *Private Prosecutors* at 1158.

schedules, other than the requirements of *Ganger*[4] and T.C.A. § 8-7-401."[5]

We, therefore, conclude that defendant's rights under the United States and Tennessee Constitutions were violated under these circumstances.

H. Waiver

The state contends any error with regard to the participation of the special prosecutors was waived due to the failure to object prior to or during trial. Ordinarily, the failure to take available action to prevent or nullify the alleged error waives the issue. T.R.A.P. 36(a); *State v. Gregory,* 862 S.W.2d 574 (Tenn. Crim. App. 1993). However, an error which has affected the substantial right of a defendant may be noticed at any time in the discretion of the appellate court where necessary to do substantial justice. T.R.Cr.P. 52(b).

"Plain error" or "fundamental error" is recognized under T.R.Cr.P. 52(b). *State v. Stephenson,* 878 S.W.2d 530 (Tenn. 1994); *State v. Adkisson,* 899 S.W.2d 626 (Tenn. Crim. App. 1994). Plain error is an egregious error that strikes at the "fairness, integrity or public reputation of judicial proceedings." *United States v. Rodriguez,* 882 F.2d 1059, 1064 (6th Cir. 1989). Some errors are so fundamental and pervasive that they require reversal without

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[4] As stated in Footnote 1, *Ganger* flatly prohibits prosecution under these circumstances.

[5] The statute only requires that the public prosecutor give the final rebuttal argument. *State v. Bennett,* 798 S.W.2d 783, 786 (Tenn. Crim. App. 1990).

regard to the facts or circumstances of the particular case. *Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

In determining whether the appointment of an interested prosecutor was harmless error, *Young* declared the error was so fundamental and pervasive that it could not be harmless error. *Young v. United States, ex rel. Vuitton,* 481 U.S. at 810, 107 S.Ct. at 2139. What is at stake is the public perception of the integrity of our criminal justice system. *Id.* at 811, 107 S.Ct. at 2139-2140. Some violations represent defects in the structure of the trial mechanism and thus defy analysis by the harmless error standards. *Arizona v. Fulminante,* 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *State v. Bobo,* 814 S.W.2d 353 (Tenn. 1991). Although we are conducting a "plain error" analysis and not a "harmless error" analysis, the pervasive error that goes to the integrity of our judicial process is relevant under either analysis.

We, therefore, conclude the due process violation is plain error affecting the very integrity of our system of justice to the extent that a new trial is the only remedy.

Conclusion

It is indeed regrettable that a new trial must be conducted for reasons unrelated to the actual merits of the charge. It is further regrettable that defendant's trial counsel did not raise an objection before trial so that the trial judge would have had an opportunity to timely deal with the issue and avoid re-trial. We certainly do not fault the trial judge for the inaction of defense counsel.

Nevertheless, the issue was raised, albeit post-trial. Since the issue strikes at the heart and integrity of our system of justice, we must address it in spite of defense counsel's inaction. The fundamental right to due process must be recognized in the interest of justice.

The judgment of the trial court is reversed, and this cause is remanded for a new trial.

PEAY and WELLES, JJ., concur.

WELLES, Judge, concurring.

I concur fully with the result reached by my learned and able colleague, Judge Riley. I write separately to express my significantly different views concerning the role and manner of participation of privately employed attorneys in criminal prosecutions. I first note that while it is obvious that "private legal counsel" were pleased that they were allowed to assume almost total control of this criminal prosecution, and thus become "special prosecutors," they were able to do so only after the publicly employed prosecutors from the office of the district attorney general declined further significant involvement in the prosecution of this attempted murder case due to their "busy schedules."[1]

The legislature has specifically authorized the victim of a crime or the family members of a victim of a crime to

[1] Obviously, the lack of interest by the district attorney general was a result, at least in part, of his determination that his time would be better spent on other matters. Had it not been for the availability of the "special prosecutors," a plea agreement favorable to the Defendant might well have materialized.

employ "private legal counsel to act as co-counsel with the district attorney general or the district attorney general's deputies *in trying cases,* with the extent of participation of such privately employed counsel being at the discretion of the district attorney general." Tenn. Code Ann. § 8-7-401 (emphasis added). If privately employed counsel's only participation is in *trying the case,* as provided by the statute, and the district attorney general retains control of the *prosecution,* the potential for violation of the defendant's rights is reduced.

Although the majority opinion does not conclude that this statute is unconstitutional as violating the due process rights of the criminal defendant, the opinion states that it is "unnecessary to reach the issue as to whether the district attorney general retained adequate control of the prosecution." I believe that in determining whether a defendant's due process rights are violated in a case involving private legal counsel serving as "special prosecutors," it is indeed necessary to reach the issue as to whether the district attorney general retained adequate control of the prosecution. In this case, however, I have no hesitation in concluding that the district attorney general did not retain adequate control. In fact, it appears that the district attorney general retained very little control.

I agree, as pointed out by the majority, that the ethical dilemmas facing "special prosecutors" are quite serious and any ethical violations on their part are relevant to a determination of whether a defendant was deprived of his right to a fair trial. Perhaps it would be helpful if our supreme court specifically addressed these ethical concerns in our Code of Professional Responsibility. The majority opinion focuses on the ethical dilemma facing private counsel representing the victim in a civil suit to

the exclusion of analyzing the level of participation of private counsel in the criminal prosecution. It appears to me, however, that private counsel employed for a fixed fee solely to participate in the criminal prosecution faces essentially the same ethical dilemma as private counsel who also represents the victim in a related civil suit, namely the conflict between zealous representation of a private client and the pursuit of justice in the public interest.

I am not convinced that the participation as co-counsel of a victim's attorney who represents the victim in a related pending civil law suit against the criminal defendant necessarily and always will violate a defendant's right to due process of law and thus require a conviction, otherwise obtained in accordance with law, to be reversed. I believe this determination is necessarily dependent upon the degree of participation in the prosecution by private legal counsel and by the corresponding degree of control over the prosecution retained by the office of the district attorney general.

As many courts and commentators have recognized, the potential danger to the due process guarantee of fundamental fairness is most pronounced when private counsel participates in the discretionary functions of the district attorney general, such as the plea bargaining process as well as the decisions of what charges to seek and whether to prosecute at all.[2] *See, e.g., Dick v. Scroggy,*

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[2] The legislative history of Tennessee Code Annotated section 8-7-401 indicates that the General Assembly was somewhat aware of the dangers of allowing private counsel to control the plea bargaining process. The original language of the House bill provided that private

(Continued on following page)

882 F.2d 192 (6th Cir. 1989); *Jones v. Richards,* 776 F.2d 1244 (4th Cir. 1985);[3] *Ganger v. Peyton,* 379 F.2d 709 (4th Cir. 1967); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors,* 47 Ark. L.Rev. 511, 531-40 (1994); Patricia Moran, Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure,* 54 Fordham L.Rev. 1141, 1158-59 (1986); Andrew Sidman, Note, *The Outmoded Concept of Private Prosecution,* 25 Am.U.L.Rev. 754, 793 (1976). This heightened concern stems from the recognition that the discretionary functions of the district attorney general are, in a sense, more difficult to review than everyday trial practice. Prudence dictates that courts be most vigilant with regard to situations involving the potential for abuse which tend to evade judicial review through ordinary means. Thus, whereas improper trial conduct of private counsel is subject to review in much the same way as the trial conduct of an overzealous public prosecutor, the participation by private counsel in the

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counsel could participate fully in cases, even where plea bargaining was deemed appropriate. Upon the recommendation of the House Judiciary Committee, however, the bill was amended to strike that language so that private counsel would not have excessive power over the plea bargaining process.

[3] In *Jones,* another Fourth Circuit case, the court distinguished *Ganger* and found no due process violation. Private counsel was retained to assist in the criminal prosecution and simultaneously represented the plaintiffs in a civil suit arising from the same incident. In *Jones,* however, the public prosecutor retained control over discretionary functions, and there was no evidence of the private prosecutors' using their position to exact a more generous settlement in the civil case. While the court did not endorse private prosecutors also being involved in a civil case, it found that the level of involvement in that case did not constitute a due process violation.

discretionary functions of the district attorney general is of greater concern because of not only the ethical dilemma faced by private counsel *but also* the inherent inadequacy of judicial review of potential abuses of those discretionary functions by private counsel. It is therefore my belief that the degree of participation of private counsel in a prosecution has great significance regardless of whether private counsel is retained only to participate in the prosecution or represents the victim in a civil suit as well.

If, in the case *sub judice,* private legal counsel had participated in this trial by being seated at counsel table with the assistant district attorney, advising with the assistant district attorney during the course of the trial, and even participating in some questioning of some of the witnesses, I do not believe the Defendant's due process rights would necessarily have been violated. However, if private legal counsel had not participated in the trial at all, but the office of the district attorney general had deferred totally to private legal counsel on the issue of a plea agreement, I believe the Defendant's due process rights would have been violated.

Here, I conclude that the district attorney general failed to retain adequate control of the prosecution. It appears that the control of the criminal prosecution was totally relinquished to the attorneys representing the victim in a pending civil law suit arising from the same incident. The "special prosecutors" apparently communicated with defense counsel concerning a substantial cash settlement of the civil case in conjunction with a possible

plea agreement in the criminal case.[4] I concur that the degree of involvement of these "special prosecutors" went beyond the role of "co-counsel" at trial as anticipated by our legislature and violated the Defendant's due process rights *and* was prejudicial to the judicial process. I, therefore, agree that this case must be reversed and remanded for a new trial.

[4] It is readily apparent that discussions of a cash settlement of a civil suit in conjunction with resolution of a criminal prosecution provide a significant and alarming setting for abuse.

T.C.A. section 8-7-106:

(a) If the district attorney general fails to attend the circuit or criminal court, or is disqualified from acting, or if there is a vacancy in the office, the court shall appoint some other attorney to supply such district attorney general's place temporarily. The acts of such district attorney general pro tem shall be as valid as if done by the regular officer, and the district attorney general pro tem shall be entitled to the same privileges, and emoluments.

(b) Notwithstanding the provisions of subsection (a), the district attorney general may:

(1) Upon the consent of the district attorney general of any other judicial district, specially appoint another district attorney general, or an assistant to that district attorney general, to conduct specific criminal proceedings, including grand jury proceedings, which the district attorney general is authorized by law to conduct in that district;

(2) Upon the consent of the executive director of the district attorneys general conference, specially appoint the executive director or an assistant to the executive director to conduct specific criminal proceedings, including grand jury proceedings, which the district attorney general is authorized by law to conduct in that district;

(3) Upon the consent of the chief executive officer of any governmental agency, appoint a licensed attorney employed by that agency to conduct specific criminal proceedings, including grand jury proceedings, which the district attorney general is authorized by law to conduct in that district;

(4) Upon the consent of the attorney general and reporter, specially appoint the attorney general and reporter, or an assistant to the attorney general and reporter, to conduct specific criminal proceedings, including grand jury proceedings, which the district attorney general is authorized by law to conduct in that district; provided, that no prosecution for an offense against the person as set forth in title 39, chapter 13 may be undertaken by the attorney general and reporter unless such prosecution arises out of, is related to, or affects an investigation, prosecution, or other proceeding which the attorney general and reporter is otherwise authorized to conduct, by cross-designation or otherwise; and

(5) Upon the written request of the attorney general and reporter, personally or through one (1) of the attorney general and reporter's assistant attorneys general, participate in the trial and direction of a specific proceeding, criminal or civil, which the attorney general and reporter is authorized by law to conduct.

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FABIEN ELDRIDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEAST DIVISION

FABIEN ELDRIDGE, Plaintiff, v. WILLIAM GIBSON, BEN FANN, DAVID DAY, MICHAEL KNOWLTON, ROBERT DURHAM, SAM LEE, and DOES 1 through 50, inclusive, Defendants.	Case No 2 95 0033 COMPLAINT FOR FEDERAL CIVIL RIGHTS VIOLATIONS AND PENDENT STATE LAW CLAIMS DEMAND FOR TRIAL BY JURY (Filed May 1, 1995)

Plaintiff complains and alleges as follows:

I.

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. section 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sections 1331 and 1343, and the Court's pendent and ancillary jurisdiction is invoked for the relevant state law claims asserted herein.

II.

PARTIES

2. At all times herein mentioned, Plaintiff Fabien Eldridge was, and now is, a citizen and resident of Putnam County, Tennessee.

3. Plaintiff is informed and believes and thereon alleges that the defendant William Gibson is the duly elected District Attorney General for the Thirteenth Judicial District of Tennessee and is a citizen and resident of Putnam County, Tennessee. Defendant Gibson is sued individually and in his capacity as District Attorney.

4. Plaintiff is informed and believes and thereon alleges that the defendant Ben Fann is a duly appointed Assistant District Attorney General for the Thirteenth Judicial District of Tennessee and is a citizen and resident of Putnam County, Tennessee. Defendant Fann is sued individually and in his capacity as Assistant District Attorney.

5. Plaintiff is informed and believes and thereon alleges that the defendant David Day is an individual engaged in the private practice of law and is a citizen and resident of Putnam County, Tennessee. At all times relevant herein, Defendant Day was acting as a private prosecutor for Robert Allen Fahey pursuant to Tennessee Code Annotated section 8-7-401. Defendant Day is sued individually and in his capacity as private prosecutor.

6. Plaintiff is informed and believes and thereon alleges that the defendant Michael Knowlton is an individual engaged in the private practice of law and is a citizen and resident of Putnam County, Tennessee. At all times relevant herein, Defendant Knowlton was acting as

a private prosecutor for Robert Allen Fahey pursuant to Tennessee Code Annotated section 8-7-401. Defendant Knowlton is sued individually and in his capacity as private prosecutor.

7. Plaintiff is informed and believes and thereon alleges that the defendant Robert Durham is an individual engaged in the private practice of law and is a citizen and resident of Putnam County, Tennessee. At all times relevant herein, Defendant Durham was acting as a private prosecutor for Robert Allen Fahey pursuant to Tennessee Code Annotated section 8-7-401. Defendant Durham is sued individually and in his capacity as private prosecutor.

8. Plaintiff is informed and believes and thereon alleges that the defendant Sam Lee is a deputy sheriff with the Putnam County Sheriff's Department for Putnam County, Tennessee and is a citizen and resident of said County. Defendant Lee is sued individually and in his capacity as deputy sheriff.

9. Plaintiff is informed and believes and thereon alleges that at all times mentioned herein, each of the defendants named in the caption of this Complaint, which is incorporated herein by this reference, was, and is, the co-conspirator of each of the other defendants, and that all of the things alleged to have been done by said defendants were done jointly in the capacity of, and as co-conspirators of, the other defendants.

10. The true names and capacities, whether individual, corporate, associate or otherwise of defendants Does 1 through 50, inclusive, are unknown to Plaintiff who therefore sues said defendant by such fictitious names. Plaintiff is informed and believes and thereon alleges that

each of the defendants designated herein as a fictitiously named defendant is, in some manner, responsible for he events and happenings herein referred to, either contractually or tortiously, and caused damage to Plaintiff as herein alleged. When Plaintiff ascertains the true names and capacities of Does 1 through 50, it will ask leave of this Court to amend its complaint by setting forth the same.

III.

UNDER COLOR OF STATE LAW

11. At all times relevant hereto, the defendants acted in concert under color of state law to deprive Plaintiff of various rights secured by the Constitution and laws of the United States as well as the laws of the State of Tennessee.

IV.

FACTUAL ALLEGATIONS

12. On or about November 10, 1992, Plaintiff was charged in a state criminal proceeding with the attempted first degree murder of Robert Allen Fahey.

13. Plaintiff is informed and believes and thereon alleges that shortly after November 10, 1992, Defendants Day, Knowlton, and Durham were retained by Mr. Fahey on a contingency fee basis to criminal prosecute Plaintiff pursuant to Tennessee Code Annotated section 8-7-401 and to file a contemporaneous civil complaint against Plaintiff for damages purportedly arising out of the same facts as the criminal prosecution.

14. Plaintiff is informed and believes and thereon alleges that Defendants Day, Knowlton, and Durham jointly and actively participated in Plaintiff's criminal prosecution from its inception while contemporaneously jointly and actively pursuing Mr. Fahey's civil complaint against Plaintiff.

15. Plaintiff is informed and believes and thereon alleges that despite Defendants Day, Knowlton, and Durham's inherent conflict of interest, Defendants Gibson and Fann intentionally and knowingly, and in their administrative capacities, permitted Defendants Day, Knowlton, and Durham to participate in the criminal prosecution of Plaintiff as private prosecutors without providing Plaintiff with notice or a hearing for same which resulted in a violation of his Constitutional and statutory rights.

16. Plaintiff is informed and believes and thereon alleges that Defendants Gibson and Fann further relinquished primary control of the criminal prosecution to Defendants Day, Knowlton and Durham, including the delivery of all criminal evidence possessed by the State of Tennessee to the private prosecutors prior to trial and prior to its disclosure to Plaintiff's defense counsel which resulted in a violation of his Constitutional and statutory rights.

17. Plaintiff is informed and believes and thereon alleges that at all relevant times hereto, Defendants Day, Knowlton and Durham conducted simultaneous settlement negotiations with Plaintiff's criminal and civil defense attorneys in which settlement of the criminal prosecution was contingent upon settlement of the civil

case for monetary damages which resulted in a violation of his Constitutional and statutory rights.

18. Plaintiff is informed and believes and thereon alleges that the defendants, acting in concert, intentionally or negligently lost or destroyed potentially exculpatory evidence that bore directly on Plaintiff's innocence which resulted in a violation of his Constitutional and statutory rights.

19. Plaintiff is informed and believes and thereon alleges that during Plaintiff's criminal trial, Defendants Day, Knowlton, Durham and Fann engaged in egregious prosecutorial misconduct for the purpose of adversely affecting the outcome of the criminal proceeding and to disparage Plaintiff's reputation and credibility in the community and cause Plaintiff to suffer extreme emotional distress and humiliation among his peers, business associates and creditors, all of which resulted in a violation of his Constitutional and statutory rights.

V.

FEDERAL CIVIL RIGHTS VIOLATIONS

20. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 19, inclusive, of this Complaint, and by this reference thereto, incorporates same herein as though set forth in full.

21. As a result of the defendants' conduct as herein alleged, Plaintiff was denied a fundamentally fair trial in the state criminal proceeding in derogation of his procedural and substantive due process rights as protected by the Fourteenth Amendment to the United States Constitution and the Tennessee Constitution and has suffered

additional violations of additional rights secured by the Fourth, Fifth and Sixth Amendments to the United States Constitution and the Tennessee Constitution and statutory law.

22. Plaintiff is informed and believes and thereon alleges that at all times material hereto defendants acted in concert to deprive Plaintiff of his Constitutional and statutory rights, and defendants knew or should have known that their conduct violated Plaintiff's clearly established Constitutional and/or statutory rights to due process of law and additional rights protected by the Fourth, Fifth, and Sixth Amendments to the United States Constitution.

23. As a direct, proximate and foreseeable result of defendants' actions, Plaintiff has suffered injury to his person and property, disparagement to his reputation and credibility in the community, severe emotional distress and humiliation among his peers, business associates and creditors, all of which caused Plaintiff to suffer general and specific damages in an amount according to proof.

24. Based on the aforementioned conduct and in doing the things hereinabove alleged, defendants were guilty of oppression, fraud and malice, and acted in deliberate disregard of Plaintiff's interest in his person, property, reputation and credibility and with intent to deprive Plaintiff of his Constitutional and statutory rights, and therefore Plaintiff should be awarded, in addition to his actual damages, punitive damages for the sake of example and by way of punishing defendants.

25. Plaintiff alleges that he is entitled to reasonable attorneys' fees pursuant to 42 U.S.C. section 1988 in an amount according to proof.

VI.

STATE LAW CLAIMS

26. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 25, inclusive, of this Amended Complaint, and by this reference thereto, incorporates same herein as though set forth in full.

27. Plaintiff is informed and believes and thereon alleges that at all times material hereto, defendants acted in concert to use Plaintiff's criminal prosecution in order to obtain an unfair advantage in the contemporaneous civil proceeding and to extract monetary damages from Plaintiff for which purpose the criminal justice system was not intended.

28. Plaintiff is informed and believes and thereon alleges that defendants' loss or destruction of potentially exculpatory evidence prior to its being tested, prior to its disclosure to Plaintiff's criminal or civil defense attorneys and prior to both the criminal and civil trials interfered with Plaintiff's due process right to a fair trial in both the criminal and civil cases and his property right to evidence in the pending civil proceeding which would have enabled him to defend the criminal and civil actions and to recover civil damages against Robert Allen Fahey for assault and battery.

29. Plaintiff is informed and believes and thereon alleges that defendants intentionally acted in concert to deprive Plaintiff of his Constitutional and statutory rights and to cause Plaintiff injury to his person and property, disparagement to his reputation and credibility in the community, severe emotional distress and humiliation among his peers, business associates and creditors and to force Plaintiff out of his business as a car salesman.

30. As a direct, proximate and foreseeable result of defendants' actions, Plaintiff has suffered injury to his person and property, disparagement to his reputation and credibility in the community, severe emotional distress, humiliation among his peers, business associates and creditors and injury to his business, all of which caused Plaintiff to suffer general and specific damages in an amount according to proof.

31. Based on the aforementioned conduct and in doing the things hereinabove alleged, defendants were guilty of oppression, fraud and malice, and acted in deliberate disregard of Plaintiff's interest in his person, property, reputation and credibility and with intent to deprive Plaintiff of his Constitutional rights, and therefore Plaintiff should be awarded, in addition to his actual damages, punitive damages for the sake of example and by way of punishing defendants.

PRAYER

WHEREFORE, Plaintiff prays for judgment against the defendants and Does 1 through 50, and each of them, jointly and severally, for each of the causes of action as follows:

1. That process issue to each of the defendants according to law;

2. That Plaintiff be awarded judgment against the defendants, jointly and severally, for compensatory damages in an amount according to proof;

3. That Plaintiff be awarded judgment against the defendants, jointly and severally, for a punitive damages in an amount of not less than $30,000,000.00;

4. That Plaintiff be awarded all reasonable attorneys' fees incurred in prosecuting this action pursuant to 42 U.S.C. section 1988;

5. That Plaintiff be awarded all costs of suit herein incurred; and

6. That Plaintiff be awarded all other and further relief as this Court may deem just and proper.

Dated: April 28, 1995.

Respectfully submitted,

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(615) 597-6725

/s/ Lena Ann Buck
Lena Buck
Attorneys for Plaintiff
FABIEN ELDRIDGE

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands his right to trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure.

Dated: April 28, 1995.

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/s/ Lena Ann Buck
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